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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice and Mr. Justice Seshagiri Aiyar.

K. S. R. M. Ramanathan Chetti and others. *Appellants* * *(Plaintiffs)*

v.

T. K. V. Ramasawmi Chetti (deceased) and others. *Respondents (Defendants and legal representatives of the 1st Defendant).*

Ramanathan Chetti *v.* Ramasawmi Chetti.

Estoppel—Exchange of immovable property—Unregistered instrument—Actings of parties—Part performance—Equitable estoppel—Transfer of Property Act, Ss. 51, 54, 118—Estoppel against statute—Compensation for improvements.

Where the plaintiffs and the defendants by an unregistered instrument agreed for mutual convenience, to an exchange of certain plots of land forming part of their adjoining house sites and the defendants erected a costly building on the land which fell to them under that instrument, and the plaintiffs lay by, and acquiesced in, such construction and even received an additional amount from the defendants on the ground that the land that fell to the share of the latter was larger in extent and the plaintiffs sued the defendants in ejectment on the ground that the instrument did not pass title,

Held per *Wallis, C. J.* (*Seshagiri Aiyar, J.* dissenting).

The plaintiffs, by reason of the contract to exchange having been fully performed and having stood by and acquiesced in the defendant's building and received a further payment are estopped from ejecting the defendants *McManus* v. *Cooke* [1] referred to.

Quære: Whether after *Mahomed Musa* v. *Aghore Kumar Ganguli* [2], the decision in *Kurri Veera Reddi* v. *Kurri Bapi Reddi* [3] is good law.

Per *Seshagiri Aiyar, J.* Where a statute enjoins that title would pass only if certain formalities are complied with, conduct and actings of parties cannot be relied on to supplement an inchoate title.

Kurri Veera Reddi v. *Kurri Bapi Reddi* [3] is not affected by the decision in *Mahomed Musa* v. *Aghore Kumar Ganguli* [2].

The plaintiffs are not estopped from ejecting the defendants, because no principle of equity or estoppel should be allowed to prevail against the plain and mandatory provision of law (Ss. 54 and 118 of the Transfer of Property Act). Where the law says that title can be acquired only in a particular way, there is no room for the application of the doctrine of estoppel

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* A. S. No. 20 of 1913. 4th November 1915.

1. (1887) 35 Ch. D. 681. 2. (1914) I.L.R. 42 C. 801 s.c. 29 M.L.J 548.
3. (1904) I. L. R. 29 M. 336 s.c 16 M. L. J. 395.

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The principle of S. 51 of the Transfer of Property Act applies to the present case and the plaintiff must pay substantial compensation determined on the extent of the damage likely to accrue to the defendant, before the plaintiff is given a decree for possession.

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura in Original Suit No. 94 of 1911.

The facts of the case appear sufficiently from the judgments of their Lordships.

S. Srinivasa Aiyangar and *K. Raja Aiyar* for the Appellants.

The plaintiffs sue to recover land which the defendants claim under an unregistered document which purports to effect an exchange. The document cannot operate as an exchange and pass title without registration *Vide* S. 118 of the Transfer of Property Act. The property is admittedly more than Rs. 100 in value.

The document is understood by the Lower Court as an award. There is no written submission in the case as is required by S. 28 of the Contract Act. Nor is it a case falling under S. 21 of the Specific Relief Act. The so-called arbitrators are not described as arbitrators but only as mediators in whose presence an agreement is arrived at. They are mere valuers for fixing the values of lands.

[At this stage their Lordships stopped the appellant's Vakil and called on the respondent].

A. Krishnaswami Aiyar for the Respondents.

My first argument is that the document, Exhibit B in the case, stands on the same footing as a decree for delivery of possession.

Assuming the first argument is unfounded, I am in the position of a person who honestly believes that the property is his own, is encouraged in that belief by the true owner and has built on the land under that encouragement. Therefore the real owner is estopped from setting up his title. *Ramsden* v. *Dyson* [1], *Vide* per Lord Cranworth at p. 140, per Lord Wenslydale at p. 168, per Lord Kingsdown at p. 170.

The case of a stranger is put on a higher footing than that of a tenant or one having a defined interest because it is referrable only to the encouragement by the true owner *Plimmer* v. *Mayor of Wellington* [2], *Attorney-General of Southern Nigeria* v. *John Holt and Co.* [3]. In these two cases, the possession of a stranger was confirmed.

1. (1866) L. R. 1 H. L. 129. 2. (1884) L. R. 9 A. C. 699 at pp. 710, 713. 3. (1915) L. R. A. C. 599

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The principle of equitable estoppel has been recognised in India. In *Ahmad Yar Khan* v. *The Secretary of State for India in Council* [1] the doctrine of equitable estoppel was applied by the Judicial Committee. The rule in *Ramsden* v. *Dyson*, [2] was applied in *Beni Ram* v. *Kundan Lal* [3], and *Narasayya* v. *Raja of Venkatagiri* [4], where a stranger is placed on a higher footing. In *Sarat Chunder Dey* v. *Gopal Chunder Laha* [5], the real owner was estopped from setting up his title. In *Dadoba* v. *Collector of Bombay* [6], the Government was held to be estopped from raising the assessment by reason of the representations and encouragement of its subordinates. *Secretary of State* v. *Dattatraya* [7], *Municipal Corporation of Bombay* v. *Secretary of State* [8]. In *Birendra Kishore Manikya* v. *Akram Ali* [9], the land holder tried to assess land as ryoti land after allowing the tenants to dig a tank in it and he was held to be estopped.

This contention is not opposed to the well-known rule that there can be no estoppel against the plain provisions of a statute. The rule is stated in *Barrow's case*[10], by Jessel, M. R. and followed in *Madras Hindu Mutual Benefit Fund* v. *Raghava Chetty* [11]. That rule has only to do with the case when reliance is placed on the very invalid instrument as the foundation of the estoppel. It only means that no man can make a law into onesself. *Chidambaram Chettiar* v. *Ramasami Aiyar*[12], *Jagadbhandu Saha* v. *Radha Krishna Pal*[13].

My last submission is that the transaction can be supported, on the ground of part performance. *Kurri Veera Reddi* v. *Kurri Bapi Reddi*[14] is no longer law after *Mahomed Musa* v. *Aghore Kumar Ganguli*[15]. The principle of the latter case had already been applied by the Privy Council in *Immudipattam Thirugnana Kondama Naik* v. *Periya Dorasami*[16]. In *Pranal Anni* v. *Lakshmi Anni*[17] no argument was addressed on the subsequent actings of parties. *Kurri Veera Reddi* v. *Kurri Bapi Reddi*[14] is a decision which affects both the Registration Act and the Transfer

1. (1901) I. L. R. 28 C. 693
2. (1866) L. R. 1 H. L. 129.
3. (1899) I. L. R. 21 A. 496 at p. 508.
4. (1910) I. L. R. 37 M. 1 at p. 15.
5. (1892) I. L. R. 20 C. 296.
6. (1901) I. L. R. 25 B. 714.
7. (1901) I. L. R. 26 B. 271 at p. 277.
8. (1904) I. L. R. 29 B. 580 at p. 606.
9. (1912) I. L. R. 39 C. 439.
10. (1880) 14 Ch. D. 432 at 441.
11. (1895) I. L. R. 19 M. 200.
12. (1918) I. L. R. 38 M. 519.
13. (1909) I. L. R. 36 C. 920.
14. (1904) I. L. R. 29 M. 336.
15. (1915) I. L. R. 42 C. 801 s.c. 29 M. L. J. 548.
16. (1900) I. L. R. 24 M. 377.
17. (1899) I. L. R. 22 M. 508; s.c. 9 M. L. J. 147.

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of Property Act. *Lalchand* v. *Lakshman* [1] and *Timan Gowda* v. *Benep Gowda* [2] take the same view as *Maddison* v. *Alderson* [3], where even under Scotch law, where writing is required for solemnity, the doctrine of part performance has been applied.

See White and Tudor's Leading Cases in Equity Vol. I, pp. 478, 479 on equitable estoppel.

S. Srinivasa Aiyangar, in reply. *Mahomed Musa* v. *Aghore Kumar Ganguli* [4] only decides that if *under the agreement* of the parties, a conveyance is necessary, its absence can be cured by the actings of parties. In any event the decision can only apply to cases under the Registration Act which precludes documents from being received in evidence without registration. It cannot by any means apply to transactions which themselves by the Transfer of Property Act have to be effected by registered instruments. The doctrine of part performance only applies to executory agreements. It does not apply to cases where the agreement is executed; the document of exchange in this case has been executed but only, not registered. The doctrine has never been extended, even in England, to conveyances which are defective in form. In introducing this doctrine in India its scope ought not to be widened by including such cases under it. In *Balkishen Das* v. *W. F. Legge* [5] in construing the Evidence Act, the Privy Council pointed out that equitable considerations ought not to influence courts in India in construing statutes. *Dhanipal Das* v. *Maneshar Bakhsh Singh* [6] *Gokul Mandar* v. *Pudmanund Singh* [7] *Webb* v. *Macpherson*[8] *Mulraj Khatau* v. *Vishwanath Prabhuram Vaidya* [9]. There can be no estoppel against a statute. *Ranchodlal Vandravandas Patwari* v. *The Secretary of State for India*, [10] *Abdul Aziz* v. *Kanthu Mallik*, [11] *Trimbak Ramkrishna* v. *Hari Laxman*[12].

The rule in *Ramsden* v. *Dyson*[13] does not apply here because the plaintiff was not himself aware that he had title to the property at the time. *Willmot* v. *Barber* [14] shows that the plaintiff should have knowledge of his legal title at the time of the stranger's building on the land. *Ramsden* v. *Dyson*[13] *Proctor* v. *Bennis* [15], Halsbury Vol. 13 p. 167. Equitable estoppel does

1. (1904) I. L. R. 28 B. 466.
2. (1915) I. L. R. 39 B. 472.
3. (1883) L.R. 8 A.C. 467, at p. 476
4. (1915) I.L.R. 42 C. 801 s c. 29 M.L.J. 548.
5. (1899) I. L. R. 22 A. 149.
6. (1906) I. L. R. 28 A. 570
7. (1902) I. L. R 29 C. 707.
8. (1903) I. L. R 31 C. 57. (P. C.)
9. (1912) I. L. R. 37 B. 198.
10. (1910) I. L. R. 35 B. 182.
11. (1910) I. L. R. 38 C. 512.
12. (1910) I. L. R. 34 B. 575.
13. (1866) L.R. 1 H.L. at p. 168.
14. (1880) L. R. 15 Ch. D. 96.
15. (1887) L.R. 36 Ch. D. 740 at p. 760.

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not operate against the provisions of the Transfer of Property Act. *Kurri Veera Reddi* v. *Kurri Bapi Reddi* [1] *Jagadbhandhu Saha* v. *Radha Krishna Pal* [2], *Abdul Aziz* v. *Kanthu Mallik* [3]. There is no further equity or estoppel in India outside S. 51 of the Transfer of Property Act.

[*A. Krishnaswami Aiyar* :—*Willmot* v. *Barber* [4] has been doubted in *Ananda Chandra Sen* v. *Parbati Nath Sen* [5]].

The Court delivered the following

The Chief Justice.

Judgment:—*The Chief Justice*:—In this case the parties by an unregistered agreement Exhibit B, dated 4th March 1908, agreed for mutual convenience to an exchange of certain plots of land forming part of their adjoining house sites. Exhibit B shows that the agreement was come to in the presence of mediators, and the effect of the oral evidence is that it was these mediators who settled the amount of the cash payment to be made by the first defendant to the first plaintiff to equalise matters, but Exhibit B is in terms an agreement signed by the party and we see no sufficient reason for treating it as the Subordinate Judge has done, as an award or for considering whether as such it is exempt from the provisions of the Registration Act. It is therefore necessary to deal with the Plaintiff's claim that owing to this want of registration he is entitled to recover back the land given by him in exchange to the defendant even though the defendant has erected on the land one of the walls of his new house which has cost over 40,000 rupees and the removal of the wall would bring down the house and although nearly a year after the exchange, when the defendant was beginning to build, the plaintiff objected to the extent of the land awarded to him in exchange and obtained a further payment of Rs. 525 from the defendant. The parties have since quarrelled and it is scarcely denied that the plaintiff's object in bringing the suit is rather to injure the defendant than to benefit himself. It is however argued that in default of registration the land remained the property of the plaintiff, as, under the Transfer of Property Act the transfer could only be made by registered instrument and that the defendant is not entitled to the benefit of any of the equities which English Courts raise in such a case against the application of the Statute of Frauds. As observed in *Maddison* v. *Alderson* [6] that statute did not make

1. (1904) I. L. R. 29 M. 336.
2. (1909) I. L. R. 36 C. 920.
3. (1910) I. L. R. 38 C. 512.
4. (1880) L. R. 15 Ch. D. 96.
5. (1906) 4 C. L. J. 198.
6. (1883) L. R. 8 Ap. Cas. 467.

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the transaction itself void, whereas it is contended that was the effect of the Transfer of Property Act and the Full Bench decision of this Court in *Kurri Veera Reddi* v. *Kurri Bapi Reddi* [1] was relied on. It was held in that case, where the price had been paid and possession delivered but the sale deed had not been registered, that the vendor was entitled to get back the property and that the contract to sell afforded no defence even though the defendant's right to sue for specific performance was not barred at the institution of the suit. White, C. J. arrived at this conclusion with some hesitation having regard to the observations of their Lordships of the Judicial Committee in *Immudipattam Thirugnana Kondama Naik* v. *Periya Dorasami* [2] and it may be necessary when the time comes to consider how far the decision of the Full Bench can be reconciled with the very general language used by their Lordships in the more recent case in *Mahomed Musa* v. *Aghore Kumar Ganguli* [3], though no doubt the transaction there in question took place before the passing of the Transfer of Property Act and the effect of its provisions is not expressly referred to in the judgment.

But assuming *Kurri Veera Reddi* v. *Kurri Bapi Reddi* [1], to be correctly decided I am not prepared to hold that it involves the proposition that where there is no registered document no amount of acquiescence on the part of the transferor will bar his right to get back the property within the statutory period. Where a lessee for a limited term erects buildings on the land and the lessor stands by and says nothing it was no doubt held in *Ramsden* v. *Dyson* [4] and in *Beni Ram* v. *Kundan Lal* [5] that the mere acquiescence of the lessor will not debar him from recovering the land at the expiry of the term. In *Immudipattam Thirugnana Kondama Naik* v. *Periya Dorasami* [6] the plaintiff sued in the year 1895 for a declaration of his title and for redemption. The mortgage in 1882 by the plaintiff's father in favour of the mortgagees provided that on redemption the property should be handed over to the contesting defendant, but their Lordships found not only that there was no registered transfer as required by the Transfer of Property Act but that it was not proved that there was any valid contract by the plaintiff's father to make the transfer to this defendant. If there had been such a contract their Lordships were of opinion that it would

1. (1904) I. L. R. 29 M. 336. (F. B.)
2. (1900) I. L R. 24 M. 377.
3. (1915) I. L. R. 42 C. 801.
4. (1866) L. R. 1 H. L. 129.
5. (1899) I. L. R. 21 A. 496.
6. (1900) I. L R., 24 M. 377.

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have been a good defence as the defendant might call on the transferor's heir to implement the contract—and this though the suit was brought more than 12 years after the date of the alleged transfer. The present case is undoubtedly much stronger. Not only was there a contract to exchange but it was fully performed and long afterwards, the plaintiff stood by and acquiesced in the defendant's building and obtained a further payment from him. In these circumstances, putting aside the conveyance altogether I think the plaintiff is estopped. Kay, J. in *McManus* v. *Cooke* [1] cites an old case, *Anon* (2 Eq. C. Ab. 522), which is both brief and apposite. "*Short* v. *Taylor*, in Lord Somer's time was cited, which was, Short built a fine house; Taylor began to build another; but laid part of his foundation on Short's land. Short seeing this did not forbid him but very much encouraged it; and when the house was built, he brought an action; and Lord Somers granted an injunction." The plaintiff's conduct in this case has been far worse than that of Short. It is clear observes Kay, J. in *McManus* v. *Cooke* [1], citing this case, that if a man builds a house partly on his neighbour's land, and the neighbour acquiesces in this being done, Courts of Equity will interfere to prevent him from disturbing it. Assuming *Kurri Veera Reddi* v. *Kurri Bapi Reddi* [2] to be rightly decided I do not think it prevents us from applying this rule in India or obliges us to countenance a purely vexatious suit such as this. I may also refer to *Plimmer* v. *Mayor, etc., of Wellington* [3] and *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool) Ltd.,* [4], which were cited before us as supporting the same view. I would therefore uphold the decree though on different grounds and dismiss the appeal with costs. In the result the appeal is dismissed with costs.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.:—I have the misfortune to differ from the learned Chief Justice. The main facts are not in dispute. By a deed dated the 4th March 1908, there was an exchange of building sites between the 1st plaintiff and the 1st defendant. The 1st defendant erected a wall on the exchanged site and put up a substantial building. This suit was instituted in 1911 for recovery of site after removing the building on it. The case for the plaintiff is that as the deed was not registered no title passed to the plaintiff. The Subordinate Judge held that the

1. (1887) 35 Ch. D. 681.
2. (1904) I. L. R. 29 M. 336 (F. B.)
3. (1884) L. R. 9 A. C. 699.
4. (1915) L. R. A. C. 599.

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document was not a deed of exchange and that the real exchange was effected by the award of arbitrators. Mr. Krishnasawmi Aiyar for the respondents drew our attention to the evidence on this point We feel no hesitation in holding that the document is a deed of exchange and that there is no satisfactory evidence to prove that the arbitrators gave an award as to the exchange. The evidence does not show that there was any antecedent dispute relating to the exchange. There is no reference in writing. On the evidence it is clear, that all that the mediators were called upon to do was to fix the price to be paid by the defendant as he was taking a larger extent than the plaintiff obtained from him. The evidence on the side of the plaintiff is clear and consistent and we accept that as being more in accordance with the probabilities of the case. We cannot accept the finding of the Subordinate Judge on this point.

The question of law arising on these facts is whether the plaintiff is not entitled to recover possession, because of his conduct in allowing the 1st defendant to erect a substantial building at a great cost. There can be no doubt that the plaintiff has no merits and his conduct has not been above-board. Still, if the law is in his favour, the Court will not be justified in refusing him relief.

The Full Bench decision of this Court in *Kurri Veera Reddi* v. *Kurri Bapi Reddi* [1] lays down that if the party resisting possession has no statutory or prescriptive title, he cannot rely on equities to resist the suit. Mr. Krishnasawmi Aiyar contended that this decision must be taken to have been overruled by the decision of the Judicial Committee in *Mahomed Musa* v. *Aghore Kumar Ganguli* [2]. I am unable to agree with this contention. In the case before their Lordships, there was a compromise in a suit. The compromise with reference to certain portions of it should have been registered. This was not done. But in pursuance of the terms, the parties were placed in possession and dealt with the properties as owners. Their Lordships held "that even although the Razinamah and the decree taken together were considered to be defective or inchoate as elements making up a final and validly concluded agreement for the extinction of the equity of redemption, the actings of parties have been such as to supply all such defects." Before the Transfer of Property Act, the law did not prescribe any

1. (1904) I.L.R., 29. M., 336. 2. (1915) I.L.R., 42 C., 801 ; s.c. 29 M.L.J. 548.

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formalities for conferring title. Under the old Registration Regulations and Acts, if a document of a particular description was in writing, but was not registered, it was not receivable in evidence. Therefore the document commented upon by their Lordships was not *ipso facto* invalid, only it was not receivable in evidence. To such a case, the decisions which construe the Statute of Frauds in England were held applicable. As pointed out by Mr. Sreenivasa Aiyangar, the reference in the judgment of the Judicial Committee to *Maddison* v. *Alderson* [1] shows that their Lordships were not considering cases for which the statute has prescribed a particular form for conferring title. The judgment of some of the noble Lords in that case would seem to show that the principle of equitable estoppel can apply only to executory contracts and not to executed contracts. See specially the judgment of Lord Blackburn. I do not think that the Judicial Committee intended to lay down that even where a statute enjoins that title would pass only if certain formalities are complied with, conduct and acting can be relied upon to supplement an inchoate title. S. 54 of the Transfer of Property Act says that a "transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made *only* by a registered instrument." The second clause of S. 118 is "A transfer of property in completion of an exchange can be made *only* in the manner provided for the transfer of such property by sale." The use of the word '*only*' in these sections excludes the possibility of title being acquired within the statutory period by any other process. I feel no doubt that their Lordships of the Judicial Committee did not intend to override statutory requirements by their observations. Their Lordships have always held with reference to Indian enactments, that "the essence of a code is to be exhaustive." See *Bal Kishen Das* v. *W. F. Legge* [2], *Dhanipal Das* v. *Manesher Bahsk Singh* [3], *Gokul Munder* v. *Pudmanand Singh* [4], *Webb* v. *Macpherson* [5], and *Mulraj Khatau* v. *Vishwanath Prabhuram Vaidya* [6]. I am therefore of opinion that *Kurri Veera Reddi* v. *Kurri Bapi Reddi* [7], is unaffected by *Mahomed Musa* v. *Aghore Kumar Ganguli* [8].

1. (1883) 8 A. C. 467.
2. (1899) I. L. R. 22 A. 149.
3. (1906) I. L. R. 28 A 570.
4. (1902) I. L. R. 29 C. 707.
5. (1903) I. L. R. 31 C. 57.
6. (1912) I. L. R. 37 B. 198.
7. (1904) I.L.R. 29 M. 336.
8. (1915) I.L.R. 42 C. 801 s.c. 29 M.L.J. 548.

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The next branch of the argument of Mr. Krishnaswami-Aiyar relates to estoppel. If I understood him aright he does not claim that the conduct of the plaintiff has given him a title to the property; his position is that courts should not afford relief to the plaintiff as he is not entitled to it by reason of his conduct. In other words, although in law the plaintiff has a title to recover, courts should reject his claim on grounds of equity. Before I deal with the cases quoted by the learned Vakil, I shall refer to the principles which this contention seems to offend. The learned Vakil for the appellant invoked the aid of the well-known principle that there can be no estoppel against law. I shall state what, in my opinion, are the uses and limitations of this rule before applying it to the present case. The rule of estoppel is one of evidence. It ought not to be allowed to prevail against a statutory right. There are many instances in which parties have been held entitled to equities, using that term in the sense of estoppel, although as pointed out by Jenkins, Chief Justice, in *Municipal Corporation of Bombay* v. *Secretary of State* [1], the two rights are distinct. Even against a statute, equity may be relied upon in certain cases. The provision in the statute may be directory and not mandatory. Equity will relieve against its strict enforcement. Certain penalties may be held *in terrorem* with a view to the prompt obedience of the statutory rule. Equity will help to relieve the rigour of the law in such cases. Under a rule of law, time may not be of the essence of the contract. Here is room for the application of equity. Apart from these and similar instances, in my opinion, no principle of equity or estoppel should be allowed to prevail against a plain and mandatory provision of law. Where the law says, as in the present case, that title can be acquired *only* in a particular way, there is no room for the application of the doctrine of estoppel. The effect of holding otherwise would be to override legislation. Courts will then be creating a title which the legislature has distinctly negatived. Whatever may be the position in England before the Judicature Act, when equitable relief was given along with and often in opposition to common law remedies, I do not think the Courts in this country have power to nullify legislative provisions. The authorities in this country support this position.

1. (1904) I. L. R. 29 B. 580.

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Chidambara Chettiar v. *Vaidilinga Padayachi* [1], *Dhiraj Chandra Bose* v. *Srimati Hari Dasi Debi* [2], *Jagadbandhu Saha* v. *Radha Krishna Pal* [3]. Mr. Krishnaswami Aiyar referred to the *dictum* of Lord Kingsdown in the well known case of *Ramsden* v. *Dyson* [4]. The actual decision in that case was that as no expectation was held out to the tenant, the landlord was not estopped. Lord Kingsdown dissented from the conclusion of the other noble Lords. The argument before the House of Lords was directed to showing that by the conduct of the landlord an equity was created in favour of the tenant. No question of statutory command or prohibition had to be dealt with in that case. I do not think the pronouncement of Lord Kingsdown and of the other noble Lords are relevant to cases where the Courts are asked to act in direct contravention of the enacted law. *Attorney-General of South Nigeria* v. *John Holt & Co.* [5] is not really against this view. In that case, the respondents had acquired by a grant from the Crown certain lands of which the sea was the boundary. As a result of the erection of protective works by them a strip of land accreted to that already possessed by them. The Crown claimed this accretion. It was conceded that ordinarily the accretion would go to the Crown; but it was contended that having agreed to give access to the sea by the original grant, the Crown was estopped from laying claim to this piece of land so as to derogate from the rights already granted. This contention was upheld. At page 620 their Lordships say: "In truth and substance what was done was to protect the land, to guard against invasion of the sea as a destructive force, and to conserve it for the use of the properties as an invaluable mercantile adjunct thereto. Further, so far as the Crown is concerned, it is recognised by law that it is the duty of the Crown to protect land from the incursions of the sea, and if, in the circumstances of the present case, a license had been granted and duly recorded, to the respondents to reclaim as was done, that license would have been in entire accord not only with the right of the subject but with the duty of the Crown. This principle is in accord with the law laid down in *Attorney-General* v. *Tomline* [6], and principally with the opinions of Fry, J. (12 Ch. D. 214 at p. 233) at the trial and Cotton, L. J., in the Court of Appeal (14 Ch. D. 58 at 69)." As I understand this

1. (1913) I. L. R. 38 M. 519. 2. (1915) 19 C.W.N. 507 s.c. 28 M.L J. 480.
3. (1909) I. L. R. 36 C. 920. 4. (1866) L.R. 1 H. L. 129.
5. (1915) A. C. 599. 6. (1880) 14 Ch. D. 58.

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Judgment, the Judicial Committee were inclined to think that the grant of land implied a license to reclaim as well. The reference to *Lyon* v. *Fishmongers Company* [1], and other cases shows that their Lordships were prepared to presume from the nature of the grant a right in the respondents as grantees to erect walls in the foreshore in order that the benefits arising from the original grant may be properly enjoyed. One other observation may be made with reference to this case. No question of statutory title as in the present appeal arose in it. *Sarat Chunder Dey* v. *Gopal Chunder Laha* [2] was much relied upon by the respondent. In that case the title deed was in the name of the mother. The son had allowed her to deal with the property. The son's property passed under the Court sale to the plaintiff and the defendant claimed title under the mother by virtue of another Court sale on the mortgage created by her. It was found that the mother was only a benamidar for the son. Their Lordships of the Judicial Committee held that the son would have been estopped from questioning his mother's dealings as she had the ostensible title in her to the property, and that consequently persons claiming under the son were similarly estopped. I fail to see how this case affords any help to the respondent. The estoppel pleaded, related to the claim as real owner against a person having a *prima facie* statutory title. The other cases quoted do not require any detailed examination. I am of opinion that the plaintiff was not estopped from suing to recover the property. I further agree with the contention of the learned Vakil for the appellant that S. 115 which has been held to be exhaustive of the law, (*Asmatunnessa Khâtun* v. *Harendra Lal Biswas*, [3]) does not cover this case. However reprehensible the conduct of the plaintiff may be, there is no suggestion in the evidence that at the time, the defendant erected his house on this land, he was aware that he alone had title to the property and not the defendant. The plaintiff has no doubt taken advantage of the infirmity in the defendant's title; but it is not shown that he was aware of this infirmity when building operations commenced and intentionally led the defendants into the belief that he had a valid title. The truth seems to be that until about the time of the suit both parties believed that a good title had been secured by the document of 1908. In this view, the plaintiff cannot be said to be estopped

1. (1876) L. R. 1 A. C. 662. 2. (1892) I. L. R., 20 Cal., 296.
3. (1908) I. L. R., 35 C. 904.

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from claiming his property. See *Barrow's case* [1].

The only other point is whether the plaintiff should be allowed to recover the property without paying substantial compensation to the defendant. Under the Transfer of Property Act, there is no question that the option should be given to the transferor to elect either to convey the property validly or to pay compensation. Mr. Srinivasa Aiyangar says that his client elects the latter alternative. He also contended that the Act in terms would not apply to the present case. S. 51 of the Transfer of Property Act speaks of the *transferee* of immovable property making improvements. Without expressing any opinion whether the term *transferee* would apply to persons who have obtained invalid transfers I think the principle of the section governs the present case. The plaintiff, in my opinion, must pay substantial damage before he is given a decree for possession. As the question has not been dealt with by the Court of First Instance, the Subordinate Judge should be allowed to return a finding on the 4th Issue, in the view I have taken of the case. The proper course will no doubt be to appoint an expert Commissioner to determine the extent of the damage that is likely to accrue and to give an estimate of the compensation to be paid.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Ranga Aiyangar and others ... *Appellants** (*Plaintiffs*).

v.

Narayana Chariar *Alias* Chakravarthi Vijiyaraghavachariar and others (*Respondents and Defendants.*)

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C. P. Code (*V of* 1908) *S.* 11—Res judicata—*Mortgage—Suit for sale—Decree for sale—Subsequent suit for redemption barred.*

A suit for sale by the mortgagee (in which there has been a decree) bars a subsequent suit for redemption by the mortgagor who was a party to the suit. *Vedapuratti* v. *Vallabha Valiya Raja* [2] followed.

Second Appeal against the decree of the District Court of Tanjore in A. S. No. 75 of 1912, preferred against the decree of the Court of the District Munsif of Tiruvadi in O. S. No. 473 of 1911.

[The facts of the case are clearly stated in the Judgment of Sadasiva Aiyar, J.]

T. M. Krishnasawmi Ayar for the Appellants.

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* S. A. No. 829 of 1914. 1st November 1915.

1. (1880) 14 Ch. D. 432.
2. (1901) I. L. R. 25 M. 300 (F.B.)

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The lower Courts are wrong in treating the decree in Suit No. 407 of 1867, on the file of the Tanjore District Munsif's Court, as barring the present suit for redemption.

The first point is that the former decree, passed at the instance of the mortgagee, contained only a declaration of the defendant's right of redemption therein, and was not executable by him (the present plaintiff).

The decree was passed prior to the Transfer of Property Act, and the form of the decree in a suit for sale by a simple mortgage is stated in Macpherson's "Law of Mortgages" at pp. 448, 457, 461. "The decree is always against the mortgagor personally and if the suit has been properly framed should declare the mortgagee's lien on the land."

Next as to the question of res judicata, the decision in *Rama* v. *Bhagchand* [1] is directly in my favour. The provision in the former decree, that the defendants are entitled to obtain possession after satisfying this decree answers to the corresponding provision, in the Transfer of Property Act Ss. 88 and 89, *viz.*,—that upon the mortgagor paying into the court the amount so due, the plaintiff shall deliver up to the defendant all documents in his possession or power, etc., etc.,

This is a condition in the decree in favour of the plaintiff (mortgagee) and ought not to be construed as a substantive decree in favour of the mortgagor-defendant. On this *vide Rama* v. *Bhagchand* [1] and *Adipuranam Pillai* v. *Gopalasami Mudali* [2], also the Judgment of Geidt, J. in *Bibijan Bibi* v. *Sachi Bewah* [3].

The decision in *Vedapuratti* v. *Vallabha Valiya Raja* [4], that was relied on by the lower courts does not assist the conclusion, arrived at, in as much as, the question decided by the Full Bench was, that a suit for redemption, barred a subsequent suit for redemption. It is no authority for the position that a decree for sale in favour of a mortgagee plaintiff, is a bar to a subsequent suit for redemption by the mortgagor to redeem, when the mortgagee has not chosen to execute his decree and thereby to extinguish the right of redemption.

The observations in *Vedapuratti* v. *Vallabha Valiya Raja* [4], tending to the contrary view, are mere *obiter dicta* and are not supportable either on principle or authority.

1. (1914) I. L. R. 39 B. 41.
2. (1907) I L. R. 31 M. 354.
3. (1904) I. L. R. 31 C. 863.
4. (1902) I L. R. 25 M. 500.

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Maloji v. *Sagaji* [1] which held that a decree passed in a redemption suit which did not provide for foreclosure or sale, was a bar to a subsequent suit by the mortgagee for sale, went too far and except under the provisions of S. 67 of the Transfer Property Act, was bad law. Both the late Chief Justice and Bashyam Aiyangar, J. did not accept the correctness of that decision. The decision of the Privy Council in *Sri Raja Papamma Rao* v. *Sri Vira Pratapa H. V. Ramachandra Razu* [2] is a case directly in point and ought to be followed. It is not possible to distinguish that case from the present and it affirms, that a decree obtained by the mortgagee in a suit for sale does not bar a subseqent suit for redemption. It has also been held that permissive decrees do not constitute *res judicata*: See Ghose on Mortgages, p. 617; *Chapel* v. *Ress* [3], *Exp Paine* [4]. Reference was made to Robbins on Mortgages and Daniel's Chancery Practice, cited in *Vedapuratti* v. *Vallabha Valiya Raja* [5].

That a subsequent suit for redemption is contemplated by the legislature even after an unexecuted decree for sale or foreclosure obtained by the mortgagee, is clear from a comparison of Ss. 60 and 67 of the Transfer of Property Act. While S. 67, prohibits, a suit by the mortgagee subsequent to a decree for redemption, there is no corresponding prohibition in S. 60, barring a suit for redemption after a decree for sale: This is conclusive to show that the right of redemption can be enforced so long as it is not extinguished by the enforcement of any process at the instance of a mortgagee.

S. 93 of the Transfer of Property Act (O. 34 R. 8 Civil Procedure Code) provides that if the mortgagor does not pay the amount it is open to the mortgagee to apply for sale, or for foreclosure. If in a suit by either the mortgagor or mortgagee, the rights of the defendant were also decreed and finally adjudicated, and the rights and liabilities of both the parties to the suit were to be considered concluded by the decree, it is strange that a provision by way of bar should appear in S. 67 and a provision by way of liberty to apply for sale should be found in S. 93 of the Transfer of Property Act, corresponding to O. 34, R. 8 of the Code.

1. (1888) I. L. R. 13 B. 567.
2. (1896) I. L. R. 19 M. 249.
3. (1852) 1 D. M. and G. 393.
4. (1853) 3 D. J. and S. 458
5. (1901) I. L. R. 25 M. 300. (F. B.)

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The dictum of the Privy Council in *Sunder Koer* v. *Rai Sham Krishen* [1], *viz.*, that according to the scheme of the Transfer of Property Act the rights of the mortgagee depend upon the directions in the decree only after the default of the mortgagor to pay, coupled with the fact that the decree is only a decree in favour of the mortgagee shows, that the liberty given to the mortgagor, to redeem within a time given in a decree for sale ought not to be construed as an involuntary decree in favour of the defendant. Though the issues may be more or less the same in a suit by a mortgagee as well as in a subsequent suit by mortgagor for redemption, still, the rights sought to be enforced are entirely different.

The right of the mortgagor to redeem given under S. 60 of the Transfer of Property Act involving a corresponding obligation upon the mortgagee to be redeemed, is quite different from the right of the mortgagee to enforce payment of the money imposing an obligation on the mortgagor to pay after due date.

K. R. Rangaswami Aiyangar for *C. V. Ananthakrishna Aiyar*, for Respondents.

The decision in *Rama* v. *Bhagchand* [2], is wrong and I adopt the criticism of it in 29 M. L. J. Notes of Indian Cases pp. 7 and 8 as my argument. In *Vedapuratti* v. *Vallabha Valiya Raja* [3], Bashyam Aiyangar, J. has fully dealt with the question.

T. M. Krishnaswami Aiyar replied.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments:—*Sadasiva Aiyar, J.*—The plaintiffs are the appellants. The first plaintiff's father, Srinivasa Aiyangar, mortgaged the plaint properties with possession to the defendant's ancestor, Srinivasachariar in 1864. The Othi deed contained also a covenant by the mortgagor to pay the mortgage money personally. The defendant's ancestor brought a suit against Srinivasa Aiyangar's sons in 1867 for recovery of the Othi amount of Rs. 136 on the charge of the mortgaged property (the plaint itself was not filed in the records but the suit might be taken as having contained the usual prayers for sale on default and for recovery of the balance, if any, from the defendants therein to the extent of their ancestral properties). In April 1872, the decree, Exhibit A, was passed of which the operative portion is as follows:—

1. (1906) I. L. R. 34 C. 150 at p. 161. 2. (1914) I. L. R. 39 B. 41.
3. (1901) I. L. R. 25 M. 300 (F. B.)

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"The plaintiffs obtain from the defendants the suit amount and all the costs of the suit, that the Othi property be sold in order to satisfy the decree, in case the decree amount be not paid within 6 months from this day, that the plaintiff is entitled to obtain interest on costs at 12 per cent. per annum from this day *and that the defendants are entitled to obtain possession of the othi land in execution through court* (வசப்படுத்தி) after satisfying the decree". This decree, passed in favour of the present defendants' ancestor primarily, but in which the present plaintiffs were also granted a right to redeem the property and to obtain the possession of it from the present defendant's ancestor in execution on payment of the amount decreed, was not executed by either of the parties to that decree. The present suit was brought nearly 40 years after the date of the former decree for the redemption of the same mortgage. (The plaintiffs 1, 2 and 3 in this suit were the defendants 4, 5 and 6 in the former suit of 1867. The plaintiffs 4, 5 and 6 in this suit are the sons of the deceased Aravamuda Aiyangar who was the first defendant in the former suit. The 7th plaintiff in this suit is the son of the second defendant in the former suit. I shall hereafter for the sake of brevity make no distinction between the plaintiffs and their ancestors or between the defendants and their ancestors.)

The sole question in this case is whether the present suit is barred as *res judicata* by the decree in the former suit. Both the lower Courts decided the question in the affirmative and hence this second appeal.

It seems to me clear, that, if in the former suit there was a decree in favour of the present plaintiffs (though they were the defendants in the former suit) and if it was an executable decree and if that decree granted them substantially the same reliefs as they now claim in this suit, they are barred by *res judicata* from maintaining this suit, and notwithstanding the strenuous and able arguments of Mr. T. M. Krishnasawmi Aiyar who appeared for the appellants before us, I have come to the conclusion that the finding of the lower courts was correct on the question of *res judicata.*

In the first place I dissent from his contention that the decree, Exhibit A, of 1872 merely declared the present plaintiff's right to get possession of the properties on payment of the mortgage amount and did not give them any right to obtain possession in execution in that suit. The Tamil word (வசப்படுத்தி) at least in

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the Tanjore District is always used to mean "the obtaining of possession in execution through Court," and I think that the decree, Exhibit A, did give the plaintiffs (who were the defendants in the suit of 1867) the right to obtain possession of the mortgaged properties through Court in execution of the provisions of that decree on their payment of the mortgage amount.

In order to clear the ground further, it has to be remarked that the decree, Exhibit A, of 1872, was passed long before the Transfer of Property Act and the present Civil Procedure Code were passed. The decree, Exhibit A, as I said before, gives the present plaintiffs, who were the defendants in that suit, a right to obtain possession of the plaint land through the Court in execution, on condition of their satisfying the decree passed in the present defendants' (then plaintiff's) favour. In *Vedapuratti* v. *Vallabha Valiya Raja*, [1] there occur several *dicta* in the long and exhaustive judgment of Sir Bashyam Aiyangar, J. At page 321, he says "whether the decree be in a suit for foreclosure or in a suit for sale or in a suit for redemption, there is, in each, a conditional decree for redemption in favour of the mortgagor, the condition being the payment by the mortgagor of the amount decreed on or before the date fixed". "Decrees for specific performance, decrees respecting rights of easement and similar decrees are often made conditional, but they are not the less 'final judgments' having the force of *res judicata*. This, I venture to state, is equally so under the English law and *all decrees whether conditional or unconditional are to be worked out and enforced in execution*". I entirely and respectfully agree with these observations. No doubt, the learned Judge was referring to decrees for sale and for redemption passed under the Transfer of Property Act, but his observations apply to this decree of 1872 also which contains a conditional decree in favour of the mortgagors for redemption, though it was a mortgagee's suit for sale. In *Adipuranam Pillai* v. *Gopalasami Mudali* [2], the following passage occurs at page 360. "The reason on which is based the decision of the Full Bench in *Vedapuratti* v. *Vallabha Valiya Raja* [1] renders it at least doubtful *whether a suit for redemption could be maintained by a mortgagor who has failed as defendant in a suit for sale on the same mortgage.*" It seems to me that the doubt so expressed is, (if I may say so with respect) a very proper doubt

1. (1902) I. L. R., 25 M., 300. (F. B.) 2. (1907) I. L. R. 31 M. 354.

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and I think that the reasoning of the decision in *Vedapuratti* v. *Vallabha Valiya Raja* [1] does prevent a mortgagor who, as defendant in the mortgagee's decree for sale got a conditional decree for redemption, from afterwards maintaining a suit of his own for redemption and possession of the mortgaged property instead of executing the conditional decree for redemption passed in the first suit. A decree for redemption is almost invariably a conditional decree whether it is passed in a mortgagee's suit for sale or a mortgagor's suit for redemption. No doubt, where it is passed in a mortgagee's suit for sale, it is not usually passed on the invitation of the mortgagor (defendant) and in the language used in *Adipuranam Pillai* v. *Gopalasami Mudali* [2] "the defendant is a decree-holder in spite of himself, an involuntary decree-holder"; but I do not see how this could, on principle, make any difference in the decision of the question whether the mortgagor-defendant who has been given such a decree is entitled only to execute that decree or whether he is entitled to bring a fresh suit for redemption despite the doctrine of *res judicata*. As I said before, the decree of 1872 is a decree in favour of the mortgagor also, as it empowers him to recover possession of the property in execution. The legislature in Act IV of 1882 has enacted that decrees passed in mortgage suits whether brought by the mortgagor or mortgagee should (if necessary) be made to contain a direction that the mortgagee shall put the mortgagor in possession of the mortgaged property on the mortgagor paying up the amount mentioned in the decree as due to the mortgagee. (See sections 86, 88 and 89 of the Transfer of Property Act, now repealed by the Civil Procedure Code which, however, re-enacts very similar provisions in O. 34, R. 2 clause (c), R. 4 clause 1 and R. 5 clause (c)). The decree of 1872 contains the same direction. Mr. Krishnasawmi Aiyar laid much stress upon what, he argued, was a material difference between the language of section 60 of Act VI of 1882 which deals with the right of the mortgagor to redeem and the language of section 67 which refers to the right of the mortgagee to obtain an order for foreclosure or sale. In section 67, the right of the mortgagee to obtain an order for foreclosure or sale is restricted to the period "before a decree has been made for the redemption of the mortgaged property." These words "before a decree has been made for the redemption

1. (1902) I. L. R. 25 M. 300. (F. B.) 2. (1907) I. L. R. 31 M. 35 at 359.

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of the mortgaged property" or the correlative words "before a decree has been made for sale of the property" do not appear in S. 60. He therefore argued, if I understood him aright, that a decree for sale in a mortgagee's suit though it may also contain a decree for redemption in favour of the defendant-mortgagor, does not bar a separate suit by the mortgagor for redemption, whereas a decree for redemption in a mortgagor's suit will bar a separate suit by the mortgagee for sale afterwards. I do not think that the insertion of the words 'before a decree has been made for redemption of the mortgaged property' in section 67 and the absence of corresponding words in Section 60 necessarily lead to any such conclusion as is contended for by the learned Vakil. These words had to be inserted in section 67 in order to indicate that the power given under section 93 of the Transfer of Property Act to the mortgagee as defendant to apply for sale of the property in a mortgagor's suit for redemption *ought* to be exercised in the same suit by the defendant-mortgagee, if he wants a sale of the property for realising his amount, and that he could not reserve it for a fresh suit as an optional remedy which he might or might not take advantage of, in the mortgagor's suit. It will be seen that under S. 93, paragraph 2. (O. 34 r. 8 clause (4)) the order for sale at the instance of the mortgagee-defendant is not an order passed as a part of the decree but an order passed on a separate application on a mortgagor (plaintiff) committing default, whereas S. 89 read with Ss. 86 and 88 makes the order for redemption in the defendant-mortgagor's favour in the mortgagee's suit for sale, a part of the original decree itself. So being made in the latter case a part of the decree itself, it was unnecessary to state in S. 60 that, when a decree has been made for redemption or for sale, the mortgagor has no right to again redeem the mortgaged property after the passing of such a decree, as his said right had been adjudicated upon in the suit itself and has become *res judicata* whether the suit was a suit by the mortgagor for redemption or by the mortgagee for foreclosure or sale.

No doubt, the case in *Rama* v. *Bhagchand* [1], quoted by the appellant's learned Vakil is in his favour. But with the greatest respect, I am unable to agree with that decision. As said in the critical notes, in pages 7 and 8 of 29 M. L. J. "In the words of S. 11 Civil Procedure Code, has not the matter directly and substantially in issue in the 2nd suit—*viz.*, the plaintiff's right of

1. (1914) I. L. R. 39 B. 41.

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redemption—been so in issue, and also heard and decided, in the former suit? What new point, right or question has the Court to hear or decide in the second suit? It will be impossible to contend that, for the application of the rule of *res judicata* to suits (as distinguished from issues), the persons should on both occasions be arrayed alike, whether as plaintiff or as defendants." The mortgagor was entitled in the former suit itself (of the mortgagee) to redeem the property not only within the six months given in the decree to pay up the decree amount, but he was entitled under the Civil Procedure Code (as decided in *Adipuranam Pillai* v. *Gopalasami Mudali* [1]) to pay it up even after the six months and at any time before a sale in execution and so prevent a sale. The Court need not be solicitous to help a negligent mortgagor at any cost. The fact that the mortgagee has to bring a suit for sale within 12 years of the date when the mortgage money became payable, whereas a mortgagor has got 60 years under article 148, for his suit for redemption, is not a sufficient or logical ground for allowing the mortgagor to obtain a fresh decree for redemption in his own suit after he had obtained one decree already in the mortgagee's suit for sale.

In the result I would dismiss the second appeal with costs.

Napier, J.

Napier, J.:—I agree. In *Vedapuratti* v. *Vellabha Valiya Raja* [2] the late Chief Justice stated the proposition thus. "The matter in issue (in a redemption suit) is, aye or no, is the mortgagor entitled to the decree which, if he succeeds, the Court is required by Section 92 to make?" In my view, the same matter is in issue in a mortgagee's sale suit, whether the suit be under English law or the Transfer of Property Act and whatever difference in form has been made by the provisions in the new code. In that view this suit is *res-judicata* and the appeal must be dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Mohideen Ibrahim Nachi ... *Appellant* (1st Respondent)*

v.

L. Mahomed Ibrahim Sahib by agent L. M. E. Lebbai Thambi. *Respondent (Petitioner.)*

Guardian and Wards Act S. 25—Application by father for custody of his child not previously in his possession—Mahomedan law—Majority under—Indian

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* C. M. A. 295 of 1915. [illegible]th December 1915.

1. (1907) I. L. R. 31 M. 354. 2. (1902) I. L. R. 25 M. 300; s.c. 12 M.L.J. 128.

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Majority Act—Effect of on the age of, as to guardianship of person—Hindu Law—Manager of Hindu family if minor can be guardian.

A Mahomedan father applied under S. 25 of the Guardian and Wards Act that his minor son aged between 15 and 16 years who was in the custody of his mother during her life time and since passed into the custody of his maternal grandmother, might be handed over to him. It was contended that the section did not apply to the case and that even if it did, as the boy was above the age of minority under the Mahomedan law, the Court had no power to direct him to be made over to the father.

Held, that S. 25 applied not only to cases where the infant is removed from the custody of the guardian but to all cases where the guardian seeks to get possession of the infant whether he was antecedently in his possession or not.

Utma Kuar v. *Bhagwanta Kuar* 1 followed.

Held also: That having regard to the Indian Majority Act, the minor is not emancipated from the control of the guardian, whether in respect of his person or his property, till he attains the age of 18.

Reade v. *Krishna* 2 followed.

Per Sadasiva Aiyar, J.:—A minor cannot be the manager of a Hindu family or the guardian of the property or person of his minor wife or child.

Appeal against the order of the District Court of Tinnevelly in O. P. No. 580 of 1915 dated 21st October 1915.

S. Srinivasa Iyangar (*K. Rajah Ayar*, with him) for Appellant.

C. V. Anantakrishna Iyer for Respondent.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments:—*Sadasiva Aiyar, J*:—This appeal is against the order of the District Judge of Tinnevelly passed under S. 25 of the Guardians and Wards Act directing that the minor Shaik Abdul Khadir who is between 15 and 16 years old, be returned to the custody of his father the petitioner. The appellant is the petitioner's mother-in-law (the mother of the deceased mother of the minor Shaik Abdul Khadir).

The contentions in appeal are (1) "that it has not been proved to be for the welfare of the minor to be returned to the custody of the father." (6th ground of appeal): (2) "The District Judge erred in holding that S. 25 of the Guardians and Wards Act applied to the case." (1st ground of appeal). (3) "The parties being *Shafis* and the boy being 16, (he) has a discretion in law to reside with his mother and in her absence with his grandmother." (5th ground of appeal.)

As regards the first of these three contentions, the District Judge's conclusion that it is for the welfare of the minor that she should return to the father has not been shown to be erroneous. On the question as to welfare, the wishes of the minor who is over 14 should, no doubt, be consulted, not as conclusive on the

1. (1915) I. L. R. 37 A. 515. 2. (1881) I. L. R. 9 M. 391.

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matter but as an important factor to be taken into account in arriving at a conclusion. The minor was examined as the appellant's second witness and he says "I know my grandmother well and I have not seen my father for several years. That is the only reason why I say I want to live with my grandmother." The learned District Judge has considered this preference which in the words of the District Judge "is not unnatural but which can hardly be deemed intelligent." I would, therefore, repel the first contention.

As regards the 2nd contention, S. 25 Cl. 1 of the Guardians and Wards Act is as follows:—"If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian." The appellant's learned Vakil argued that, as the minor's maternal grandmother was the lawful guardian of his person under the Mahomedan Law after the mother's death and till he attained the seventh year of his age and she was in custody of the minor's person till that age and that as she was only continued in the custody of the person of the minor till now, the father never had the actual custody of the boy's person from when the father (respondent) became entitled to such custody and hence the minor did not live in the custody of the father at any time, nor was he removed from the father's custody and therefore no order for his return to such custody can be made under S. 25.

In *Annie Besant* v. *Narayaniah* [1], their Lordships of the Privy Council say at page 35, that "a suit *inter partes* is not the form of procedure prescribed *by the Act* for proceedings in a District Court touching the guardianship of infants." This observation does not however definitely lay down that the Act is exhaustive as to the removal of guardians. The preamble of the Act, (Act VIII of 1890) is "whereas it is expedient to consolidate and amend the law relating to guardian and ward." In *Sham Lal* v. *Bindo* [2], Blair and Banerjee, JJ. held that the Guardians and Wards Act was intended by the Legislature to be a complete code defining the rights and remedies of guardians and wards, that no separate suit would lie by a Hindu father for the custody of his child and

1. (1914) 27 M. L. J. 30. 2. (1914) I. L. R. 26 A. 594.

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that he must resort to the remedy given by S. 25 of the Act. In the very recent case reported in *Utma Kuar* v. *Bhagwanta Kuar* [1], Chamier and Piggott, JJ. follow *Sham Lal* v. *Bindo* [2], and hold that a guardian appointed under the Act was only entitled to apply under the Act for the custody of the ward and could not bring a separate suit. In this case in *Utma Kuar* v. *Bhagwanta Kuar* [1] a very similar argument to that put forward in the case before us was urged before the learned Judges, namely, that as the mother was not in custody of the child when she was appointed guardian of the person, S. 2 which mentions "order for return to her custody" cannot confer jurisdiction on the court to pass an order for placing the minor for the first time in the custody of the guardian. The learned Judges overruled this contention on two grounds: (*a*) that the court had power under S. 12 of the Act to place the minor in the temporary custody of the appointed guardian notwithstanding that the application of the guardian for her appointment as such had been granted already; and (*b*) that S. 25 can be availed of by the guardian even though she had not been in the actual custody of the minor at the time of her appointment as such, as she might be deemed to have got custody "technically" from when her appointment was made and that an order to place the boy in her custody can therefore be brought under the words "order for return to custody" used in S. 25.

While I feel doubtful (with the greatest respect) as regards the applicability of S. 12, I have after anxious consideration arrived at the opinion that though some straining of the language of S. 25 has to be resorted to, the clear intention of the legislature will be carried out by the interpretation placed by the Allahabad High Court on that section. I do not think it at all likely that the Legislature intended to omit to provide for the grant of a power to the District Court to entertain an application by a guardian for the custody of his ward for the 1st time even where the the District Court had itself appointed him as such guardian, in a case where the ward had never before been in his custody while the Act has been anxious to enact that orders for temporary custody of the ward could be made even before the appointment of the guardian. Nor is it likely that a remedy by a separate suit in such cases was intended by the Legislature. In *Jagannadha Rao* v. *Kamaraju* [3], the words "taking out of the keeping of the lawful

1. (1215) I. L. R. 37 A. 515. 2. (1914) I. L. R. 26 A. 594.
3. (1900) I. L. R., 24 M. 284.

guardian of such minor" found in S. 363 of the Indian Penal Code were held to include cases where the actual "keeping", out of which the minor was taken had been in a person who was not the lawful guardian but in a third person who had obtained the custody of the minor with the guardian's knowledge and consent. In the present case, it seems to me clear from the evidence that the grandmother had the custody of the boy with the knowledge and consent of the father after the boy attained the 7th year of his age and the father himself might be deemed to have been in "custody" of the boy under such circumstances within the meaning of S. 25 and an order to the appellant to put the boy in the custody of the father can be passed under S. 25 as falling within the expression "order for the return" to the custody, found in that section. A ward who was never in the actual custody of his legal guardian but was in his legal custody (the actual custody being with the guardian's consent with another) might be deemed to be removed from the custody of the guardian when the person in actual possession repudiates to the guardian's knowledge the right of the guardian to the actual or legal custody of the minor. An order for return to the custody will be effectuated by putting the minor either in the guardian's actual custody or even by putting the minor in the actual custody of some other person delegated by the father (like a school master or a friend) to obtain that custody from the wrong doer. To treat the word 'custody' as including both actual and constructive custody in all the three places where that word occurs in S. 25 (1) does not seem to me to be too violent a stretch of the language of the section. I would therefore reject this second contention also.

As regards the third contention, Amir Ali, Vol. 2 page 290 says that "the Shafis and Hanbalis allow the boy at the age of 7 the choice of living with either of his parents. Should he prefer to continue with his mother, he is allowed to do so until he attains the age of puberty, when he has no option *and his guardianship devolves on the father*. In practice, however, the father's right to the custody of the boy's person terminates with his puberty for, he is then *personally* emancipated from the *patria potestas*." In a book called Minhaj Et Talibin a manual of Muhamedan Law according to school of Shafi), it is said, at pages 67 to 69 "the incapacity of a minor ceases at puberty, only

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if his intelligence is sufficiently devoloped to allow of his being entrusted with the administration of his property. The minor who, having attained the age of puberty, has an intelligence insufficiently developed to be entrusted with the management of his property remains in a state of incapacity, otherwise his incapacity ceases *ipso facto* on his attaining majority." The shafi law also seems to fix the age of 15 as the age of majority unless signs of puberty have shown themselves earlier (but not earlier than 9). In *Reade* v. *Krishna* [1] it was held that though under Hindu Law the father is not entitled to the custody of the person of his son after the boy attained 16 years of age, the passing of the Indian Majority Act of 1875, (S. 3) by continuing the minority of the boy till he completed the 18th year of his age, extended the right of the father to the custody of the boy's person till such age of 18. Notwithstanding the able arguments of Mr. S. Srinivasa Aiyangar that that decision is unsound so far as it deals with the right of a Hindu son to *personal* emancipation from the *patria potestas* after he attains his 16th year, I am not prepared to dissent from that decision especially as S. 2 cl. (c) of the Indian Majority Act impliedly affects the "capacity" in all ways of any person who had not attained majority under the law applicable to him before 2nd March 1875, other than in respect of the matters excepted in the section. If notwithstanding the personal emancipation under Hindu Law, a Hindu boy continues under the custody of his father till 18, a Mussalman boy also is bound to remain in the custody of his guardian till he attains 18 notwithstanding that under the Shafi Law to which he is subject, his personal emancipation would have taken place when he attained the age of 15 or when he attained puberty between the ages of 9 and 15. I would, therefore, reject this third contention also. It only remains to notice two minor arguments advanced for the appellant. One of them was based upon the practice of the English Courts in granting writs of *Habeas corpus*. The principal cases relating to the English practice were considered in *Reade* v. *Krishna* [1] and it was pointed out in that case that the writ of *Habeas corpus* is not the appropriate remedy for enforcing the natural right of the father over the person of a son when such son is over 14 and that other appropriate legal remedies should be resorted to by the father for obtaining the

1. (1881) I. L. R. 9 M. 391.

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custody of the person of such a boy. The second minor argument was based on S. 21 of the Guardian and Wards Act which impliedly assumes that a minor is (a) competent to act as guardian of his wife and child, (b) that he is competent to be the "managing member of an undivided Hindu family" and that (c) he is as such manager, competent to be the guardian of the wife or child of another minor member of that family. This final clause has got its own implication that while any other minor is competent to be guardian of his wife or child, a minor who is a junior member of an undivided Hindu family is not competent to be guardian even of his own wife or child. I am very doubtful whether a minor can at all be the managing member of a Hindu family, though he is the senior male member. "Guardian" in S. 21 is evidently intended to include the guardianship of both person and property. It does seem anomalous that a minor could be the guardian of the person of his wife and children, that is, entitled to the custody of their person and the management of their properties while his own person is subject to the custody of the legal guardian of his person and his properties are under the management of the legal guardian of his properties. But this particular S. 21 cannot, in my opinion, be held to derogate from the rights of the legal guardian of a minor's own person. I might venture to suggest that the Legislature should amend S. 21 by omitting the portion following "child or" and by confining the rights of a minor guardian over his wife and child to the control of their persons so far as it is necessary to exercise his conjugal right and the right of fondling his child so that he might have no power to interfere with the management of their properties and so that the guardianship of their properties might be vested in the guardian of his own properties. We know of Hindu boys of five marrying girls of three and it does look absurd that a married boy of 10 should be competent to be the guardian of his wife's person and property and that if he happens to be the senior member in an undivided family consisting of himself and his two younger brothers aged (say) five and three respectively he should be, their guardian and the guardian of the wife of his brother aged five and the manager of her properties and of the undivided family properties of the three boys.

In the result, I would dismiss the appeal with costs, extending the time for compliance with the District Court's order till

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Napier, J.

the expiry of two weeks from this day. The respondent undertakes not to conduct the marriage of the minor till the latter attains the 18th year of his age.

Napier, J. :—I agree. I think that it is too late to reconsider the correctness of the decision in *Reade* v. *Krishna* [1] applying the provisions of the Indian Majority Act to the right of personal custody. On the construction of S. 25 of the guardians and Wards Act I have, like my learned brother, felt considerable difficulty. Undoubtedly on the strict letter of the section Mr. Srinivasa Aiyangar's contention should succeed. We have, however, to consider the object of the section read with the preceding section. We could not extend the powers but we can I think hold that the large rights given by the section include lesser rights not specifically provided for The object of Ss. 24 and 25 is to declare the right of the guardian of the person of a minor to the continuous custody of his person, and to provide a machinery for enforcing it. It can never have been intended to leave unprovided for a case where the right of a different guardianship had up to a certain period been vested in a different person, for the Act purports to be a consolidating Act. What has happened is that the legislature in prescribing the machinery for enforcing a guardian's rights and stating the limitations within which it is to be exercised has used language for the circumstances in which the remedy is to be enforced in terms that strictly do not cover all the circumstances. It can never have been intended that a guardian should not be empowered to enforce his right of custody when it first arises when he can enforce it when the minor runs away or is forcibly removed. Mr. Srinivasa Aiyangar argued that these proceedings are in the nature of *Habeas corpus* and must be strictly limited. I am unable to agree with the view that they are of that character. The case relied on *In the matter of Saithri* [2] is no authority for this contention. The proceedings there were of the nature of *Habeas corpus* under S. 491 of the Criminal Procedure Code directed against the person alleged to be detaining the minor. The learned Judge decided on the authority of the English cases that it was not a proper case for the issue of an order. The nature of the writ is stated by Coleridge, J. in a passage quoted on page 312 of the above Judgment:— "*Habeas corpus* proceeds on the fact of an illegal restraint". There is no question of restraint here, nor does the section

1. (1881) I. L. R., 9 M. 391. 2. (1891) I. L. R. 16 B. 307.

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deal with such a position. Under S. 25 of this Act the order goes to the minor not to the person with whom he is residing and is independent of the question of consent or restraint. The right of a guardian to the custody of the person of a minor is clearly stated in S. 24. He is "charged with the custody of the ward and must look to his support, etc." It is his statutory duty, and I cannot read S. 25 which follows as limiting his powers of enforcing his right to the extreme cases of leaving or removal. In my mind those words must be read to include cases where the custody-at-law is in a certain person but the minor refuses to come or is detained. The cases where the court has strained the language of a section to give effect to other provisions and the policy of the Act will be found in Maxwell on Interpretation of Statutes and Halsbury's Laws of England. In my opinion this is a case where it may properly be done.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice and Mr. Justice Seshagiri Aiyar.

Sitharama Chetty v. Sir S. Subramania Iyer.

T. Sitharama Chetty	... *Appellant * (2nd Plaintiff) in Appeal No. 328 of 1913.*
v.	
Sir S. Subramania Iyer, K. C. I. E., and others.	*Respondents (1st Plaintiff, Defendants, members of the Board of Control, new Trustees and Treausrer now appointed by the Court of the Subordinate Judge of Trichinopoly and Supplemental Respondents).*

Religious Endowments Act (Act XX of 1863) Ss. 3,4—Power of Court to frame scheme—Civil Procedure Code, S. 92—Powers of Committee—Death of member—Not suspended—Board of Revenue powers of—Appointments of hereditary trustee—One trustee hereditary, rest appointed by committee subject to committee—Right to call for accounts.

Court's jurisdiction to frame a scheme under S. 92 Civil Procedure Code, is not excluded by the fact that the temple for which the scheme is to be framed is one subject to a Temple Committee but in framing the scheme the Court should not unduly interfere with the powers entrusted by the statute to the Committee.

The powers of the Committee are not suspended by the occurrence of a vacancy among its members:

Santhalva v. *Manjanna Shetty*[1] dissented from.

Quaere whether it was competent for the Board of Revenue under Reg. VII of 1817 to divest itself of all responsibility by appointing a hereditary trustee.

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*A. Nos. 328 and 355 of 1913. 10th November 1913.

1. (1911) I. L. R. 34 M. 1 . c. 20 M. L. J. 814.

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Per Chief Justice :—A temple of which one of the trustees is a hereditary trustee and the other trustees are appointed by the Committee comes under S. 3 of Act XX of 1863.

Some of the decisions have unduly fettered the powers of the Committee which it was intended by the Legislature should possess all the powers conferred on the Board of Revenue by Reg VII of 1817.

Per Seshagiri Aiyar, J. :—There is no reason to doubt the correctness of the course of decisions of this Court as to the powers of the Committee though it is doubtful if the decisions that lay down that no account can be called for from hereditary trustees are right.

Nature and scope of visitatorial jurisdiction considered.

Appeals against the decree of the Court of the Subordinate Judge of Trichinopoly in Original Suit No. 25 of 1912.

T. Rangachariar for 2nd plaintiff appellant in A. S. 328 of 1913.

T. V. Venkatarama Aiyar appellant in A. S. 355 of 1913.

P. R. Ganapathi Aiyar, T. Narasimha Aiyangar and *C. Padmanabha Aiyangar* for the Respondents.

The Court delivered the following

The Chief Justice.

Judgments :—*The Chief Justice* :—These are appeals from a decree of the Subordinate Judge of Trichinopoly framing a scheme for the management of the temples at Srirangam. The case is one of great importance because this is admittedly the first time a scheme has been framed under what is now S. 92 of the Civil Procedure Code for a temple subject to a Temple Committee under Act XX of 1863. In the Lower Court all parties appear to have been willing that a scheme should be framed, but on appeal objection has been taken on behalf of the Committee to the scheme approved by the Court on the ground that it is not open to the Court to frame a scheme of this sort interfering with the statutory management of the Temple Committee. It will be convenient in the first place to consider the position of the Temple Committee under the Statute more especially as the Subordinate Judge in approving of the introduction of a new governing body known as the Board of Control has been influenced by the fact that in his view the powers of the Temple Committee are of a very restricted character. Prior to Regulation VII of 1817 the British Government and the Hindu Rulers before them had exercised powers of a visitatorial character over such foundations. See *Rajah Muttu Ramalinga Setupati* v. *Periyanayagam Pillai* [1]. Under that Regulation which was framed for the due appropriation of the rents and produce of lands granted for the support of Hindu Temples, etc., certain statutory powers and duties were

1. (1874) L. R. 1 I. A 209 at p. 232.

conferred upon the Board of Revenue. Under S. 2 they were charged with a general superintendence of all endowments in land or money granted for the support of Hindu Temples Under Ss. 3 and 5 a duty was imposed on them of seeing that the endowments are appropriated to the purposes for which they were granted and to the repairs of the buildings, and under S. 4 they were empowered to dispose of buildings which could not be repaired. Ss. 7 to 11 provide for enquiries and reports to the Board by its local agents. Ss. 11 to 14 are important. Under S. 11 the local agents are to report to the Board all vacancies in the office of trustees, managers or superintendents, whether these officers are hereditary or have been in the nomination of Government, and in the latter case to recommend fit and proper persons for the approval and confirmation of the Board. On the receipt of the report under S. 12, S. 13 requires the Board either to appoint the persons so nominated or " to make such other provision for the trust, management or superintendence as may seem to them right and fit with reference to the nature and conditions of the endowment " after obtaining any further information they may require. The Board actively exercised all these powers until the year 1841 or 1842 when, in deference to strong objections which were taken to this course by certain persons in England, the Board were ordered to withdraw as far as possible from the active management of Hindu Temples. No alteration however was made at the time in their statutory powers and duties under the Regulation and it was not until the passing of Act XX of 1863 that the situation was regularised and the powers exercised by the Board under the Regulation were transferred to Temple Committees constituted under that Act in the case of temples in which the nomination of the trustee, manager or superintendent thereof at the time of the passing of this Act (1863) was vested in or subject to the confirmation of Government. This is the effect of S. 3 and Ss. 7 to 12 of the Act, Ss. 4 to 6 dealing with cases in which the right of appointment was not vested in Government. S. 13 imposes upon all trustees, managers and superintendents the duty of keeping accounts and empowers and requires the Temple Committees to require the production of such accounts at least once a year. Lastly Ss. 14 and 18 provide for the institution with the preliminary leave of the Court of suits by persons interested against trustees, managers or

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The Chief Justice.

superintendents or members of the Temple Committees for any misfeasance, breach of trust or neglect of duty, and empower the Courts to direct specific performance of any act and to award damages, and to remove the trustee, manager or superintendent. These sections do not empower the Court to frame a scheme for the management of the temple affairs, *Karedla Vijayaraghava Perumalayya Naidu* v. *Vemavarapu Sitaramayya*.[1].

It was in my opinion clearly the intention of the legislature that the extensive powers conferred on the Board of Revenue should be exercised thereafter by the Temple Committees and I think the Court should be very slow to construe the Act in such a manner as to impede the due exercise of these powers. I am therefore with great respect unable to agree with the decision in *Santhalva* v. *Manjanna Shetty* [2], which was cited as showing the necessity for a scheme and which decides, if I rightly understand it, that the powers of the Committee are suspended by the occurrence of a vacancy among its members. No authority is cited in judgments in support of this view and the decision has been dissented from in *Raghunandan Ramanuja Das* v. *Bibhuti Bhushan Mukerjee* [3], on the authority of an English case *Doe* v. *Godwin* [4], which is directly in point. This also appears to me not to be in accordance with the principles laid down in *Anantanarayana Ayyar* v. *Kuttalam Pillai* [5], as to the Committee being governed by the rules applicable to corporations. The term 'Committee,' said Pollock, C. B. in *Reynell* v. *Lewis* [6], means "an individual or body to which others have delegated a particular duty," and I can see no reason why the remaining members constituting a majorty should not be able to act during a vacancy. In the absence of any decisive authority the other way the argument *ab inconvenienti* is in my opinion sufficient to show that such must have been the intention of the legislature.

Further with reference to the numerous decisions of this Court relating to the powers of the Committee to which Mr. Gangapathy Iyer has called our attention in the course of his exhaustive argument as showing the necessity for a scheme, I cannot help saying with great respect that some of these decisions appear to me to fetter the Committee unduly, and I think

1. (1902) I. L. R. 26 M. 361.
2. (1910) I. L. R. 34 M. 1.
3. (1911) I. L. R. 39 C. 304.
4. (1822) 1. Dowl. and Ry. 259.
5. (1899) I. L. R. 22 M. 481.
6. (1846) 15 M. and W. 526.

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that the able judgment of Davies, J. in *Seshadri Ayyangar* v. *Nataraja Ayyar* [1], with which Collins, C. J. agreed in the main and the recent decisions in *Venkatachala Pillai* v. *The Taluq Board, Saidapet* [2], and *Thiruvengadatha Aiyangar* v. *Ponnappa Aiyangar*, [3] are more in conformity with the terms of the Act and the intention of the legislature.

It is necessary to consider one of these decisions more particularly, as the contention has been raised for the 1st plaintiff that the Temple Committee has no power over the Srirangam Devasthanam, because at the coming into force of the Act of 1863 one of the trustees under an arrangement made by the Board of Revenue had become hereditary as held in *Ganapathi Ayyar* v. *Sri Vedavyasa Alasinga Bhattar* [4]. That one trusteeship is hereditary is no doubt *res judicata* as between the Committee and the hereditary trustee by reason of that decision. Mr. T. V. Venkatrama Aiyar who appeared for the Committee stated that there is evidence to show that the Board never appointed any hereditary trustee, and alleged that they had no power to do so in the exercise of the statutory authority under S.13 of the Regulation. This was apparently the opinion of Sir Charles Turner in *Appasami* v. *Nagappa* [5], though the opposite view was taken in *L. Venkatesa Nayudu* v. *Shri Shadagopa Swami* [6], and followed in *Ganapathi Ayyar* v. *Sri Vedavyasa Alasinga Bhattar* [4]. As to this I will merely observe that *Sheik Davud Saiba* v. *Hussein Saiba* [7], is no authority for the proposition for which it is cited in *Ganapathi Ayyar* v. *Sri Vedavyasa Alasinga Bhattar* [4], and *Santhalva* v. *Manjanna Shetty* [8] that where the Board made one of the trusteeships hereditary, it deprived itself of authority to appoint additional trustees. The immediate question here is whether this Devasthanam is subject to the Temple Committee. It was not questioned in *Seshadri Ayyangar* v. *Nataraja Aiyyar* [1] and *Ganapathi Ayyar* v. *Sri Vedavyasa Alasinga Bhattar* [4] that it is so subject, and it is admitted by the 1st plaintiff in his plaint in the present case. Further, it is I think clear that Ss. 3 and 4 of the Act of 1863 were introduced to cover all classes of cases, and even assuming that in 1863 one of the trustees was hereditary and the other two were nominated

1. (1898) I. L. R. 21 M. 179.
2. (1910) I. L. R. 34 M. 375.
3. (1915) 28 M. L. J. 209.
4. (1906) I. L. R. 29 M. 534.
5. (1884) I. L. R. 7 M. 499 at p. 509.
6. (1872) 7 M. H. C. R. 77.
7. (1893) I. L. R. 17 M. 212.
8. (1910) I. L. R. 34 M. 1.

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by the Temple Committee, I think the case comes under clause 3 rather than under clause 4. In any other view I should feel bound to consider whether the decision in *Ganapathi Ayyar* v. *Sri Vedavyasa Alasinga Bhattar* [1] can be supported.

This objection being overruled, we have next to consider whether it is competent and desirable that the scheme framed by the Subordinate Judge should be approved with or without modifications. Now as to this I take it the Court cannot interfere with the statutory powers conferred upon the members of the Committee so as to deprive them of their statutory functions. See *Attorney-General* v. *Governors of the Foundling Hospital* [2], although following the practice of the Court of Chancery it might frame a scheme conditional on legislative sanction being obtained for it, as to which see *In re Shrewsbury Grammar School* [3]. The decision in *Attorney-General* v. *Wyggeston's Hospital* [4], which appeared to go further was disapproved in *Attorney-General* v. *Payne* [5]. In my opinion the most helpful authority cited before us was the Judgment of Chitty, J. in *Attorney-General* v. *Governors of Christ's Hospital* [6]. The learned Judge observed "I prefer to state my own opinion broadly. I hold that it is beyond the jurisdiction of the Court to sanction the Attorney-General's scheme in the face of the opposition of the existing governing body. Their title is founded on Royal Charter, and is established by Act of Parliament. To whatever lengths the Court may have gone, it has never assumed legislative authority; it has never by a stroke of the pen at one and the same time revoked a Royal Charter, and repealed an Act of Parliament. It has never ousted from its rights of administering the charitable trusts such a body as the present governors against their will, and that, too, in a case where no breach of trust is charged. There is no authority in the books for any such proposition. Yet such is the proposition which underlies the Attorney-General's scheme. I consider that I am not at liberty to deprive the existing governing body of their right of control over the income of the funds vested in them, either permanently, as proposed by the scheme, or temporarily, as suggested by the Attorney-General in his reply. In a word, I cannot, under guise of executing the trusts cypres, upset the constitution of the present governing body, or, by transferring

1. (1906) I. L. R. 29 M. 584.
2. 2 Ves. Jun. 41.
3. 1. Mac. and G. 324.
4. 12 Beav. 113.
5. 27 Beav. 168.
6. (1896) 1 Ch. 879 at p. 888.

their powers and duties of administering the trusts to another body, reduce them to the position of being bare trustees of the funds vested in them. To establish such a scheme as that submitted by the Attorney-General, nothing less than Act of Parliament will suffice."

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That case however does not go so far as to decide that the Court cannot frame any scheme at all for a charity under statutory management. On the contrary, although as observed in the judgment no case of breach of trust or maladministration of any kind was suggested by the Attorney-General against the governing body, and there was no case of failure of the trusts or of the charitable objects of the endowment, the learned Judge, whilst rejecting the Attorney-General's scheme, still held himself at liberty to sanction the scheme submitted by the Governors themselves proposing certain alteration to meet the altered circumstances of the time. Following that decision, I think we are entitled in the present case to come to the assistance of the Committee and to introduce certain changes which under the decisions it is not now open to the Committee to introduce, or which are admitted by them to be desirable. Further than this I do not feel justified in going.

The result is that the management will remain in the trustees subject to the statutory superintendence of the Temple Committee; and the proposed Board of Control must go. As regards the number of the trustees we think we may enable the Committee to do that which under the decision in *Ganapathi Aiyar* v. *Sri Vedavyasa Alasinga Bhattar*[1] they can no longer do of themselves, *viz.*, to appoint two additional trustees, but the nomination must be in the Committee pursuant to the statute. We may also provide that in future, trustees shall hold office for only 5 years. This, it is admitted, is one of the most urgent reforms, and the competency of the Committee to introduce it of themselves has been questioned. The proposed treasurer must also be disallowed as an independent officer, but we think it desirable that a paid officer of the trustees should be appointed to perform duties similar to those assigned to the treasurer but under the trustees. As regards finance we think it should be the duty of the trustees to prepare a budget annually and submit it to the Committee under whose superintendence they are. We also think an audit should be insisted on. It has

1. (1906) I. L. R. 29 M. 534.

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been arranged that the 1st plaintiff should submit a revised scheme or schemes on these lines in one month. There will be no order as to costs in this Court.

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Seshagiri Aiyar, J.:—I agree with my Lord. If I travel over the same ground in my judgment, it is because the points raised in appeal are of far reaching consequences.

Two questions have been raised affecting, to a great extent, the jurisdiction of the Civil Courts. Mr. Venkatrama Aiyar on behalf of the Committee broadly contended at the outset that the scheme sanctioned by the Subordinate Judge was within the powers of the Trichinopoly Temple Committee and that consequently it is *ultra vires* of the Civil Courts to frame a scheme. A somewhat modified contention was advanced at a later stage that all the provisions in the scheme which interfered with the statutory powers of the Committee should be deleted. Mr. Rangachariar was prepared to support the Committee's contentions only to this extent. On the other hand, Mr. Ganapathi Aiyar on behalf of the Dharma Rakshana Sabha argued that the Trichinopoly Temple Committee had no jurisdiction over the Srirangam Temple, as at the time of the passing of Act XX of 1863, there was a hereditary trustee. This contention, if accepted, would leave the Courts unfettered regarding the settlement of a scheme. It is necessary to give a ruling on these preliminary points before considering the merits of the case.

I shall first deal with Mr. Ganapathi Aiyar's contention. I agree with him that the expression " the nomination of the trustee, manager or superintendent thereof " in S. 3 includes the entire body of trustees, managers or superintendents (See *Perry* v. *Jackson*, [1]. But it is doubtful whether it was competent to the Board of Revenue under Regulation VII of 1817 to divest themselves of all responsibility for management by handing over the affairs of a Devasthanam to hereditary trustees. The language of S. 13 of the Regulation which confers general powers to adopt measures for carrying out the objects of the trust must be restricted to the cases for which a report is to be called for under the preceding sections. However that may be, I feel no doubt that the Committee has jurisdiction over this temple. There have been numerous suits to which the Committee and the trustees were parties in

1. (1792) 4 Term Reports. 516 s.c. 100 Eng. Rep. 1150.

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which it was held that the temple was under the jurisdiction of the Temple Committee, *e. g. Seshadri Ayyangar* v. *Nataraja Ayyar* [1] *Ganapathi Ayyar* v. *Sri Vedavyasa Alasing Bhattar,* [2] etc. These decisions are binding on the Committee and the trustees. The plaintiffs in the present case admit that the temple falls under S. 3 of Act XX of 1863. They are not entitled to recede from that position. Moreover the documents to which our attention was drawn show that only the right to select a trustee was given to the family of the Sthalathars, and that the selection was subject to the approval of the Board of Revenue. It cannot, therefore, be contended that the Board of Revenue created a hereditary trustee over whose appointment they had no control If this question had been raised in proper time, evidence might have been forthcoming to show that the term *hereditary* has been loosely applied in this case. I agree with the learned Chief Justice that this temple comes under S. 3 of Act XX of 1863 and that the Committee has jurisdiction over it.

The question whether the aid of the Civil Courts can be invoked to frame a scheme when a statutory body like the Temple Committee has the right of superintendence is a far more difficult one.

There are no reliable data regarding the exercise of supervision by the ancient kings of the land over temples. The text of Narada which says "राज्ञ एवहि दासः स्यात् प्रव्रज्यावसितो नरः" "that a king can reduce to slavery a sanyasin who is guilty of incontinence," seems to suggest that over religious bodies and institutions, the king had a general power of supervision. Beyond this cryptical saying, there seems to be no authority regarding the jurisdiction of the ancient sovereigns over Hindu temples. When and at what stage the ancient sovereigns exercised superintendence over religious institutions, it is not necessary to consider. In *Rajah Muttu Ramalinga Setupati* v. *Perianayagam Pillai,* [3] the Judicial Committee say that such jurisdiction existed in ancient times. Consequently they very early came to the conclusion that the king as *parens patria* should protect the religious institutions from malversation in the same way that he looked after the rights of his lay subjects. Lord Brougham in *Mayor of Lyons* v. *East India Company,* [4], says : "The jurisdiction

1. (1898) I. L. R. 21 M 179.
2. (1906) I. L. R. 29 M. 534.
3. (1874) 1 I. A. 209.
4. (1836) 1 M. I. A. 175.

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of the Court, moreover, extends over all British subjects residing within the limits of the Charter, whether in the British or native dominions, and this affords facilities for the execution of the charity under the Court's superintendence, which could not exist in any of the cases cited." In *Attorney-General* v. *Brodie* [1], Lord Langdale pointed out that the Supreme Court had an equitable jurisdiction similar to and corresponding with the equitable jurisdiction exercised by the Court of Chancery in England over charities. There is no doubt that the mofussil Courts had similar powers. In *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* [2], which was an appeal from a mofussil Court, their Lordships of the Judicial Committee proceeded on the footing that Civil Courts had jurisdiction to see that temple funds were properly applied. It is clear from the Charter granted to the East India Company that they were authorised "to judge all persons belonging to the said Governor and Company or that should live under them in all causes, whether civil or criminal according to the laws of the *kingdom* and to execute justice accordingly" (Charter of Charles II in 1661). This authority was confirmed by the subsequent Charters. Their history is fully set out in Cowell's Courts and Legislative authorities in India and in Ilbert's Government of India. I do not propose to attempt a summary of the various regulations here. Their purport is best expressed in S. 13 (c) of the Madras Civil Courts Act. "In cases where no specific rule exists the Courts shall act according to justice, equity and good conscience." This clause only embodies the principle has been recognised by the British Government from the beginning of its administration of civil and criminal justice in India. It is not necessary to cite authorities for the position that the rule of equity and justice had to be found in the decisions of the English Courts. My conclusion is that the mofussil Courts in India were Courts of both law and equity and that they exercised jurisdiction over religious and charitable institutions in the same way as Courts of Chancery did in England.

I shall next consider whether the Court of Chancery in England would have had jurisdiction to frame a scheme like the one we are now considering, with special reference to the fact that the Temple Committees as statutory bodies had certain powers delegated to them. It was pointed out in 1 I. A. 209 that the powers delegated to the Board were analogous to the powers con-

1. (1846) 4 M. I. A. 190. 2. (1869) 13 M. I. A. 270.

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ferred on *visitors* in England. The nature of the powers possessed by visitors is not easily ascertainable. In *Phillips* v. *Bury*, 1 Holt, C. J., thus describes the functions of a visitor: "an authority to inspect the actions and regulate the behaviour of the members that partake of the charity, ... to prevent all perverting of the charity, or to compose differences." In Tudor on Charities, the visitatorial tribunal is described as "a domestic forum, the court of the founder." It was pointed out in *Green* v. *Rutherforth* 2 that the visitor's powers are circumscribed by those given him by the statute. He should not exceed or depart from them.

Having ascertained to some extent the nature of the duties cast on the visitor, I shall now consider whether the contention that the Courts are powerless when a statutory body is created whose powers are analogous to those of the visitor in England is well founded. The decision in *Attorney-General* v. *Governors of Christ's Hospital* 3, was strongly relied on by the appellant. The observations of Chitty, J. do not deny jurisdiction to Civil Courts although they fetter its exercise a great deal. The language of the Charter and of the Act of Parliament commented on in that case are not before us. Moreover certain facts are mentioned in the judgment which rendered it inequitable for the Court to interfere. His Lordship says "To whatever lengths the Court may have gone, it has never assumed legislative authority." From the subsequent reference to the provision of the Attorney-General's scheme, it is apparent that the learned Judge held on the merits that that scheme should not be accepted. I do not think this case is authority for denying jurisdiction to the Courts altogether. *In re Endowed Schools Act 1869, In re Christ's Hospital* 4, does not carry the matter any further. *Clephane* v *The Lord Provost, &c., of Edinburgh* 5, only lays down that the purposes of the trust cannot be altered by the Courts. In *Attorney-General* v. *The Dedham School* 6, the Master of the Rolls ruled that where the founder had conferred specific powers on a visitor regarding internal management, the Court should not interfere with such powers. In *Attorney-General* v. *Dixie* 7, the Lord Chancellor says "I have long been perfectly satisfied that this Court has

1. (1788) 2 T. R. 346 at p. 352. 2. (1750) 1 Ves. Sen. 462 27 Eng. Rep 1144.
3. (1896) 1 Ch. 879. 4. (1890) 15 A. C. 172.
5. (1869) L. R. 1 Sc. A. 417. 6. (1857) 23 Beaven 350 s.c. 53 Eng. Rep. 138.
7. (1805) 13 Ves. J. 519 s.c. 33 E. R. 388.

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jurisdiction." The above cases do not sustain the proposition contended for by the appellant that the Court is deprived of jurisdiction by reason of the existence of a visitor or of a statutory body to control the affairs of a trust.

On the other hand, it seems well established that the power is in the Court to administer a charitable or religious trust provided it does not unduly interfere with the visitor or the statutory body. In *Stevens* v. *Chown*, *Stevens* v. *Clark*, [1] Farwell, J. quotes with approval Willes, J's classification of liabilities relating to trust: "There is that class where there is a liability existing at common law, and which is only re-enacted by the statute with a special form of remedy; there, unless the statute contains words necessarily excluding the common law remedy, the plaintiff has his election of proceeding either under the statute or at common law. Then there is a second class, which consists of those cases in which a statute has created a liability, but has given no special remedy for it; there the party may adopt an action of debt or other remedy at common law to enforce it. The third class is where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it." In my opinion, the Temple Committees come under the first of these classes. I have already referred to the right possessed by the Crown over all religious institutions. The general right possessed by the subject to ask the Courts' assistance to set right abuses and to have a scheme framed independent of the statute has been recognised in numerous decisions. See *Karuppa* v. *Arumuga* [2]. *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran* [3], *Subbayya* v. *Krishna* [4], *Rangasami Naickan* v. *Varadappa Naickan* [5], *Srinivasa Chariar* v. *Raghava Chariar* [6], *Radhabai* v. *Chimnaji Bin Ramji Sali* [7]. Therefore the powers of the Committee are not exclusive. The observations of Farwell, J. are very opposite to this class of cases. "Now, if I find that the statute enacts, either by way of new creation or by way of re-statement of an ancient right, a right of property, that at once gives rise to the jurisdiction of the Court to protect that right. If the Act goes on to provide a particular remedy for the infringement of that right of property so created, that does not exclude the jurisdiction of this Court to protect the right of pro-

1. (1901) 1 Ch. 894.
2. (1882) I. L. R. 5 M. 383.
3. (1887) I. L. R. 10 M. 375.
4. (1890) I. L. R. 14 M. 186.
5. (1893) I. L. R. 17 M. 462 at p. 466.
6. (1897) I. L. R. 23 M. 28.
7. (1878) I. L. R. 3 B. 27.

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perty, unless the Act in terms says so." In *Attorney-General* v. *Wyggeston's Hospital* 1, Lord Langdale, the Master of the Rolls had to consider the rights of a Governor of a hospital. His Lordship held that greater powers were given to him than was warranted by the original charter. Then he proceeds: " even if it should appear to be otherwise, and that this was within the power, nevertheless, if in the course of the 200 or 300 years, by acting upon the power, it has turned out, and is shewn by experience, to be prejudicial to the objects of the charity, to the extent of giving an equal benefit to persons who are not objects of the charity— namely, to the lessees, for it comes to that—then I think that this Court could not avoid saying, that the circumstances were so changed, that the interests of the charity and of the hospital required a new mode of conducting the business and affairs of the charity." These observations apply *mutatis mutandis* to the present case. If after 50 years of administration by the Committee, the Court finds that circumstances have taken place which demand a remodelling of the machinery originally employed, I do not think we are powerless simply because a statutory body had certain powers conferred on it suited to the exigencies of the situation as it then existed.

In *The Attorney-General* v. *St. Cross Hospital* 2 Sir John Romilly says: " The only remaining point, then, on this part of the case, is, whether the jurisdiction of this Court is taken away by reason of the visitorship of the Bishop of Winchester. If this were the law, it would be very unfortunate, for it does not require the history of this case to teach us that the visitorship, vested in any one, whether a corporation sole or aggregate, or the heir of the founder, is a mere nominal office, *the duties and functions of which are rarely, if ever, spontaneously performed.* But the law is not so. Where there is a clear and distinct trust, this Court administers and enforces it as much where there is a visitor as where there is none. This is clear, both on principle and authority. The visitor has a common law office and common law duties to perform, and does not superintend the performance of the trust which belong to the various officers, which he may take care to see are properly kept up and appointed. *Green* v. *Rutherforth* 3, *Ex-parte Berkhampstead Free School* 4 and several other cases, expressly

1. (1849) 12 Beaven 113, s.c. 50 Eng Rep. 1003.
2. (1853) 17 Beaven 435, s.c. 51 Eng. Rep. 1103.
3. (1750) 1 Ves. Sen. 462, 27 Eng. Rep. 1144. 4. (1- 3 2 -es. & Beames. 134.

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establish the authority of this Court in cases of trusts, and the duty of this Court to see that they are properly performed, notwithstanding that there may be a special or a general visitor." I have made this lengthy extract because it seems to me that in India under the superintendence of Temple Committees we have reached a position where "the duties and functions are rarely if ever spontaneously performed." The written statement of the Committee in this case shows how powerless the Committee were in carrying out their duties, and how little they did or endeavoured to do. It would be disastrous in this country if Courts were to refuse to intervene on the ground that a statutory body has been created to exercise supervision over the trusts.

At the same time, I concede that in formulating a scheme, the courts should not unduly interfere with the powers entrusted to Committees. The cases quoted by the learned Vakil for the Committee establish that position. *In re Sherewsbury Grammar School* [1], *The Attorney-General* v. *Aspinall* [2], *Attorney-General* v. *The Mayor, &c., of Dublin* [3], and *Attorney-General* v. *Governors of the Foundling Hospital* [4]. The learned Vakil for the Sabha did not seriously contest this position. His argument was directed to showing that the Board of Revenue and their successor, the Committee had only certain limited powers, and that neither the Regulation nor the Act took away the plenary jurisdiction possessed by the Courts. I shall now very briefly examine the provisions of these two statutes mainly with a view to see how much of the scheme of the Subordinate Judge should be accepted.

The preamble to the Regulation refers to the ground for believing that the produce of the endowments "is in many instances appropriated contrary to the intentions of the donors," and speaks of the duty of the Government to see to its proper application. The *duty*, I take it, is that of the *parens patriae*. In *Duke of Beaufort* v. *Berty* [5], Lord Macclesfield, Lord Chancellor, says that the protection of children was assumed by the Court of Chancery in analogy of its powers over trusts. Consequently, the care of trusts seems to have been regarded as the first duty of the King. It was, therefore, very early held in Madras that the remedies under the regulation were not exhaustive but

1. (1849) 1 Mac. & Gor. 324.
2. (1837) 2 Myl & Cr. 613.
3. (1827) 1 Bli. (N. S.) 312.
4. (1793) Ves. Jun. 42.
5. (1721) 1 P. W. 702 at p. 703 and 704.

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only supplementary of the ordinary remedies. *Ponnambala Mudaliar* v. *Varaguna Rama Pandia Chinnatambiar*[1]. See also *Kassyvassy Kristna Putter* v. *Vangala Shangaranat Josser*[2]. I do not think that the view to the contrary held in *Bhima Rout* v. *Dasarathi Dass*[3], is consistent with the history of the temple legislation in this country. I shall now deal with the other Sections of the Regulation. S. 2 is the most important of them. The right of general superintendence is wide enough to include the power to appoint additional trustees. I am in agreement with the decision in *Thiruvengadatha Aiyangar* v. *Ponnappa Aiyangar*[4]. Even in *Ganapathi Aiyar* v. *Sri Vedavyasa Alasinga Bhattar*,[5]. Sir S. Subramania Aiyar, J. says that such appointments can be made for good and sufficient cause. I infer the power to appoint additional trustees from Ss. 12 and 13 read with S. 2. It is not necessary in this case to consider the exact nature of the rights conferred on the Committees by S. 2: whatever may be involved in the term *superintendence*, I am of opinion that some of the decisions of this Court to which I shall refer later on have not been shown to be wrong in placing a limit on its import. Further the right of superintendence must be limited to the exercise of the powers conferred on the Board or on the Committee whose jurisdiction is analogous to that of the visitor in England. Ss. 3 to 10 do not call for special notice. Ss. 11 to 13 are important. S. 11 requires local agents to report to the Board vacancies and casualties, the names of the persons claiming to be trustees and the mode in which previous appointments were made. S. 12 deals with cases in which the Government had the exclusive power of appointment and requires the local agent to suggest names. The 13th Section deals with the duties of the Board on the receipt of such reports. It seems to me that the clause "or make such other provision for the trust, etc.," should be confined to the appointment contemplated in Ss. 11 and 12. As I said before, they do not seem to warrant the construction that the Board can appoint hereditary trustees by virtue of this clause so as to deprive themselves of all control over them. S. 14 gives a right of suit to persons aggrieved by the exercise of the powers vested in the Board.

1. (1872) 7 M. H. C. R. 117. 2. (1858) S. D. A. p. 39.
3. (1912) I. L. R. 40 C. 323. 4. (1914) 28 M. L. J. 209.
5. (1906) I. L. R. 29 M. 584 s. c. 16 M. L. J. 435.

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Coming to the Act, it must be premised that it was not the intention of the legislature to give larger powers to the Committee than was possessed by the Board. Ss. 3 and 7 entrust to the care of the Committees all the institutions which were under the control of the Board of Revenue. A feeble attempt was made to show that the Committee could hold possession of the trust property. S. 12 which refers to the transfer of the possession of properties does not provide for the vesting of the properties in the Committee. On the other hand Ss. 11 and 13 which speak of the duties of the trustees to keep accounts make it clear that the Committee was not to hold properties.

The course of decisions on this subject is well established in this Presidency. Speaking for myself, I feel no hesitation in saying respectfully that they are perfectly sound. See *L. Venkatesa Nayudu* v. *Shri Shadagopa Swami* [1], *Ponduranga* v. *Nagappa* [2], *Sankara Murti Mudaliar* v. *Chidambara Nadan* [3]. *Seshadri Ayyangar* v. *Nataraja Ayyar* [4], *Pattikadan Ummaru* v. *Emperor* [5]. *The Chairman, Municipal Council of Rajahmundry* v. *Susurla Venkateswarlu* [6], and *Ramanathan Chettiar* v. *Swaminatha Aiyar* [7]. It has also been held that the Committee should not concern itself with the internal management of the institution. *Mayandi Chetti* v. *Oliver* [8], and *Subba Naidu* v. *Gopalaswami Naidu* [9]. It stands to reason that when there is a trustee who is responsible for the management of the properties and for their application, his control over the servants of the establishment should not be interfered with by the Committee. The very limited power as to accounts given by the second clause of S. 13 to the Committee bears out this position. It is doubtful whether the decisions which lay down that no accounts should be called for from hereditary trustees are right. See *K. Venkatabalakrishna Chettiar* v. *Kaliyanaramaiyangar* [10], and *Fakurudin Sahib* v. *Ackeni Sahib* [11]. S. 13 clause 2 refers to all trustees whether hereditary or otherwise. S. 14 has been much debated during the argument. It is a limited remedy that is given by this section to the public. It only empowers the Court to direct the specific performance of duties which have been

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1. (1872) 7 M. H. C. R. 77. 2. (1889) I. L. R. 12 M. 366.
3. (1893) I. L. R. 17 M. 143. 4. (1898) I. L. R. 21 M. 179.
5. (1902) I. L. R. 26 M. 243. 6. (1907) I. L. R. 31 M. 111.
7. (1912) 23 M. L. J. 278. 8. (1898) I. L. R. 22 M. 261 s. c. 8 M. L. J. 195.
9. (1905) 15 M. L. J. 185. 10. (1868) 5 M. H. C. R. 48.
11. (1880) I. L. R. 2 M. 197.

in the scheme we think it necessary that the board of trustees should once a year prepare a balance sheet of the accounts of the Devasthanam and publish it for the information of the public in the local Gazette. The scheme should be modified as above indicated. As was done with reference to the Conjeevaram scheme we think liberty should be given to any of the trustees or any member of the Committee or to the 1st plaintiff in this case to move the Court for such alterations in the scheme as seem desirable in the light of the experience that may have been gained of its working.

These appeals and the Memoranda of Objections by the 4th and 7th respondents in Appeal No. 328 of 1913 and by the 1st respondent in Appeal No. 355 of 1913 came on for final hearing after the submission of the revised scheme by the 1st plaintiff, and the Court delivered the following

Judgments:—The scheme brought in by the 1st plaintiff is accepted by us subject to certain modifications. The scheme as finally approved.—

General.

1. The Temple of Sri Ranganadhaswami at Srirangam and the minor temples and shrines attached thereto (inclusive of the temple of Sri Pundarikaksha Perumal at Tiruvallarai) and constituting with the said temple the Srirangam Devasthanam and all the properties, movable and immovable which have been or may hereafter be dedicated to the said deity are and shall be vested in the Sri Ranganadhaswami deity.

2 (*a*). The word "Court" in this scheme and in the rules that may be framed under this scheme shall mean the Subordinate Judge's Court at Trichinopoly or such other Court of Original Civil Jurisdiction of the lowest grade as may have jurisdiction under S. 92 of Act V. of 1908.

2 (*b*). The word "Committee" shall mean Trichinopoly Taluq Devasthanam Committee formed under Act XX of 1863.

2 (*c*). The expression "Sri Ranganadhaswami Devasthanam" hereinafter referred as "the Devasthanam" shall mean and include the shrine of Sri Ranganadhaswami at Srirangam and all the Subordinate shrines attached thereto both in Srirangam and outside (inclusive of Sri Pundarikaksha Perumal Temple at Tiruvallarai).

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3. The administration of the Devasthanam shall vest in a Board of Trustees subject to the control and superintendence of the Committee.

Board of Trustees.

4. The Board of Trustees shall consist of five members, *viz.*,

1. A hereditary Stalathar Trustee by rotation as at present,
2. A Thengalai Trustee.
3. A Vadagalai Trustee.
4. A Sivite (including a Smartha),
5. A Madhva.

Trustees Nos, 2 to 5 shall be appointed by the Committee.

5. (*a*) The term of the office of the Trustees appointed by the Temple Committee shall be 5 years but the said trustees shall be eligible for re-appointment.

5 (*b*) Stalathar Trustees shall hold office by rotation each for one year commencing with the 1st Chitrai

6. No office holder of the temple or a member of the Temple Committee shall be appointed by the Committee as a member of the Board of Trustees.

7. (*a*) No one shall be eligible to be appointed by the Committee as a Trustee of the Devasthanam :—

1. Who is under 25 years of age,

2. Who is an uncertificated bankrupt or an undischarged insolvent.

3. Who is suffering from unsoundness of mind, total blindness, total deafness, total dumbness, leprosy, or paralysis of such a nature which unfits him for work.

4. Who is a member of a joint family of which some other member is at the time a member of either the Committee or of the Board of Trustees and

5. Who has been convicted of any offence involving moral turpitude, or against whom orders under Ss. 109, 110, Criminal Procedure Code have been passed.

7. (*b*) In the case of a rotation trustee who is a minor or who is subject to any of the disqualifications stated in 2, 3, and 5, the Committee may appoint from among the Sthalathars a competent person in his place.

Cashier

8. A Cashier shall be appointed by the Board of Trustees on a salary of Rs. 75 per mensem and shall furnish such security as may be determined by the rules framed hereunder.

9. The Board of Trustees shall have powers of supervision and control over the Cashier, but shall not suspend or dismiss him unless 4 out of the 5 Trustees are in favour of such a course. An appeal shall lie to the Committee from an order of dismissal, whose decision shall be final.

Budget.

10. (*a*) The Bord of Trustees shall three months prior to the commencement of the Fasli, prepare and submit to the Committee a budget of the estimated receipts and expenditure for the ensuing year.

(*b*) The Committee shall, with such modification as it may deem necessary, pass the Budget and send it back to the Board of Trustees at least a month before the beginning of the Fasli.

(*c*) If the Budget be not sent by the Board of Trustees as aforesaid, the Committee may, after giving 14 days notice to the Board of Trustees, themselves frame and prepare the Budget and send it to the Board of Trustees.

(*d*) If the Committee fail to send the Budget within the time fixed above, it shall be competent to the Board of Trustees to act upon the Budget sent by them until the Committee send the same approved.

(*e*) The Board of Trustees shall have a permanent advance for urgent expenses of such amount as may be fixed in the rules to be framed in this scheme. But the expenditure which may be incurred by them shall not exceed the provision of the Budget nor shall any extraordinary expenditure be incurred without the special sanction of the Committee.

Account and Audits.

11 (*a*) The accounts shall be audited by an auditor appointed by the Committee upon such remuneration as may be fixed by the Committee, to be paid from the Devasthanam funds. An abstract of the said accounts prepared and certified together with his report shall be sent to the Board of Trustees, who shall submit the same to the Committee with their remarks if any.

(*b*) It shall be the duty of the Board of Trustees to give the auditor all facilities for carrying on the audit and to produce all accounts, vouchers and other papers required by him.

(*c*) It shall also be the duty of the Board of Trustees to carry out the suggestions made by the auditor in his report and approved by the Committee.

(*d*) The Board of Trustees shall prepare every year a balance sheet of the assets and liabilities of the Devasthanam and publish it after verification by the auditor in the local Gazette and in such other papers as they shall think fit.

(*e*) The accounts of each fasli, together with the report of the auditor and the abstract of the accounts and the balance sheet, shall be exhibited at the Devasthanam office from the 15th October to 15th January following and also at the time of the Mukkoti festival at the temple premises and all worshippers of the temple shall be entitled to inspect the same at all reasonable times.

12. All surplus income shall be invested for the benefit of the temple by the Board of Trustees in accordance with the rules to be framed for the purpose.

13. (*a*) No immovable property of the temple shall be leased for more than three years without the sanction of the Committee.

(*b*) All leases and sales shall be by public auction or in such other manner as may be provided for in the rules.

14. No jewels or other movable property shall be sold or otherwise alienated without the sanction of the Committee.

15. An inventory of the jewels and other properties shall be maintained by the Board of Trustees and shall be verified by the auditor every year.

16. Rules consistent with this scheme shall be framed by the District Court of Trichinopoly after notice to the Committee and the Board of Trustees subject to the control of the High Court

1. for ensuring the proper receipts and custody of all offerings, income and funds,

2. for preventing misappropriation or ensuring the proper management of the temple funds and properties,

3. for the conduct of the business of the Trustees,

4. for the framing of the budget,

5. for the duties of the Cashier and the amount and form of security to be given by him and by the other servants of the temple and the duties of the auditor,

6. for the investment of any surplus, and

7. for all such other matters as may be necessary for the proper management of the secular affairs of the temple.

The Rules so framed shall be liable to alteration in like manner.

Sitharama Chetty v. Sir S. Subramania Iyer.

17. Any of the plaintiffs or the Dharma Rakshana Sabha or any member of the Temple Committee or of the Board of Trustees may, be petition, apply to the High Court for such further or other directions in the matter as may be necessary or for modification of this scheme or any of the provisions thereon.

The scheme shall come into operation at once.

Messrs. K. Seshadri Aiyangar and K. Singam Aiyangar who were appointed by the Committee shall hold office for 5 years from this date. Those that were appointed by the Sub-Court shall cease to hold office from to-day.

IN THE HIGH COURT OF JUDICATURE AT MADRAS. [FULL BENCH.]

Present:—Sir John Wallis, Chief Justice, Mr. Justice Abdur Rahim and Mr. Justice Seshagiri Aiyar.

A. T. S. A. Annamalai Chetty, and others. *Petitioners** (*Plaintiffs*)

v.

S. V. Velayuda Nadar ... *Respondent* (*Defendant.*)

Annamalai Chetty v. Velayuda Nadar.

Limitation Act (Act III of 1908), Art. 80—Promissory note payable on demand—Writing fixing time—Suit by payee—Limitation after expiry of period—Covenant not to sue for limited time—Pleadable in bar to action.

Where a promissory note payable on demand was accompanied by a writing fixing a period for payment.

Held, that the suit by the payee was governed by Art. 80 of the Limitation Act and time began to run on the expiry of the time fixed.

A covenant not to sue for a limited time may be pleaded in bar to an action brought in contravention of the same. *Simon* v *Hakim Mahomed Sherif* [1] *Somasundaram Chettiar* v. *Narasimha Chariar* [2] overruled.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Temporary Subordinate Judge of Ramnad at Madura in Small Cause Suit No. 88 of 1913, dated 23rd October 1913.

B. Sitarama Rao, for the petitioners.

S. Ranganatha Aiyar, for the respondent.

The Court (Oldfield & Sadasiva Aiyar, JJ), made the following

ORDER OF REFERENCE TO A FULL BENCH:—

Sadasiva Aiyar, J.

Sadasiva Aiyar, J.—The plaintiffs are the petitioners in revision. They brought the suit on a promissory note dated 4th

* C. R. P. No. 338 of 1914. 22nd October 1915.

1. (1891) I. L. R. 19 M. 368. 2. (1905 I. L. R. 29, M. 212.

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August 1909 payable on demand. On that same date, however, a writing, Exhibit A 1, was given by the drawer as follows:— "Ten months' thavanai (time for payment) from the date of the pro-note has been fixed for this note." Thus Exhibit A was in the words of article 73 of the first schedule of the Limitation Act accompanied by a writing postponing the right to sue for ten months. The present suit was brought on the 30th June 1913 more than three years from the date of the promissory note, 4th August 1909, but within the limitation period of three years from the expiry of the ten months' period and within the period of the extension given by the provisions of S. 4 of the Limitation Act which permits the plaintiff to institute a suit on the day on which the Court reopens if the time expired during the vacation of the Court. The Subordinate Judge relying on *Somasundaram Chettiar* v. *Narasimha Chariar* [1] which followed *Simon* v. *Hakim Mahomed Sheriff* [2] held that the writing which evidences the argument to give time for payment is a collateral agreement, that notwithstanding that agreement, the plaintiff could have sued on the promissory note within the ten months and that therefore, time for calculating limitation began to run from the date of the promissory note itself and the suit was therefore barred. He does not mention the article of the Limitation Act which in his opinion applies to the case. I presume that he applied article 73 of the Limitation Act and that was the article relied upon by the respondent's learned Vakil.

The petitioner's learned vakil Mr. B. Sitarama Rao argued in the first place that the decision in *Somasundaram Chettiar* v. *Narasimha Chariar* [1] decided only that notwithstanding the contemporaneous written agreement restraining and postponing the payment, the holder of the note was entitled to sue at once and not that the limitation period should be calculated from the date of the note under article 73 of the Limitation Act. Conceding that the actual point decided was only that the holder was entitled to sue from the date of the promissory note notwithstanding the accompanying agreement, that actual decision necessarily involves the conclusion that the cause of action on the note arose at once notwithstanding the accompanying agreement. If the cause of action arose at once the period of limitation must also begin at once except in the cases of disability, etc., provided for by the

1 (1905) I. L. R. 29 M. 212=16 M.L.J. 103. 2. (1891) I. L. R. 19 M. 368.

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Limitation Act. I might add that Justice Sir Subramania Aiyar who was one of the two Judges who decided *Somasundara Chettiar* v. *Narasimha Chariar* [1] decided as a single Judge the prior case in *Simon* v. *Hakim Mahomed Sheriff* [2] in which he enunciated the same view as to the arising of the cause of action at once on a promissory note payable on demand even though there was a contemporaneous written agreement postponing the time for payment. In deciding those two cases, that very learned Judge seems to have been guided by certain English decisions, the most important of which is the case of *Salmon* v. *Webb and Franklin* [3]. It seems to me that those English cases are based upon the doctrine of the English Law that an agreement not to sue for a limited time or a covenant for a limited time only, that is, a covenant not to sue for a limited time was no answer to an action on a promissory note or even an ordinary bond unless that covenant was supported by a fresh consideration. As pointed out by Sir Subramania Aiyar, J., himself in *Davis* v. *Cundasawmi Mudali* [4] the Indian Law (enacted in Ss. 62 and 63 of the Contract Act) is different; article 73 of the Limitation Act also clearly implies, in my opinion that an agreement in writing accompanying a promissory note which agreement postpones the time for payment is a valid and enforceable agreement. Of course the negotiable character of the promissory note is not destroyed and *bona fide* holders without notice of the accompanying agreement in writing will be protected even if they sued before the term mentioned in the accompanying agreement had expired. As between the parties to the note and as between the drawer and holders with notice or holders who are not holders in due course I am unanle to see why the accompanying agreement, if in writing should not be enforced. (That oral agreements to grant time will not extend limitation has been decided long ago by this Court and when such oral agreement varies the term of a written contract, it would, in most cases, be inadmissible in evidence under S. 92 of the Evidence Act.)

Article 73 of the Limitation Act provides three years' period from the date of the promissory note for a suit on a promissory note payable on demand and "not accompanied by any writing postponing the right to sue." The promissory note in the present case as it was accompanied by such writing cannot fall, in my

1. (1905) I. L. R. 29 M. 212.
2. (1891) I. L. R. 19 M. 368.
3. (1852) 3 H. L. Cas. 510.
4. (1891) I. L. R. 19 M. 398.

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opinion, under article 73. If it cannot fall under article 73 it must in my opinion fall under article 80, which relates to a suit on a bill of exchange, a promissory note or bond not herein expressly provided for the article providing a period of three years from when the bill note or bond becomes payable. The promissory note in this case not having been provided for in article 73 or by any other previous article falls under article 80 and as it becomes payable according to the accompanying agreement ten months after the date of the note, the three years must be calculated from the expiry of those ten months.

Mr. Sitarama Rao argued on the strength of *Sanjivi* v. *Errapa* [1] that the suit came under the general article 120 which gives a period of six years from when the right to sue accrues. I am unable to accept this contention.

In the first place the terms of the promissory note in *Sanjivi* v. *Errapa* [1] were very peculiar as the note was not one containing merely a promise to pay on demand, nor was it accompanied by anything in writing postponing the period of payment; but its own terms were "to pay at any time within six years on demand." Hence the learned Judges thought that article 120 applied.

In the second place article 80 of the Limitation Act is not referred to in the Judgments and seems not to have been brought to the notice of the learned judges. Mitra in his Limitation Act page 960 referring to this case doubts its soundness and is evidently of opinion that article 80 was the proper article to be applied in such cases. Another learned writer Rustomji in his recent book on the Law of Limitation at page 233 also thinks that article 80 ought to have been applied. In *Kuttiassan* v. *Suppi* [2] article 80 was applied to a promissory note which was payable on demand to be made after the payee attained majority, the Court holding that time began to run from when the payee after attaining majority made his demand.

I would, therefore, refer for the decision of the Full Bench the following question:—

What article of the Limitation Act applies to the suit on the promissory note sued on and when did the period for calculation of limitation begin?

(The opinion of the Full Bench will govern the decisions in the connected petitions also).

1. (1883) I. L. R. 6 M. 290. 2. (1893). 3 M. L. J. 199.

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Oldfield, J.

Oldfield, J.—I should have been inclined after so many years to follow *Somasundaram Chettiar* v. *Narasimhachariar* [1] as settled law. But I am not sure that English decisions, on which it is based, are applicable in India or that they represent the English law correctly. *Vide* observation on *Cumber* v. *Wane* [2] and *Thimbleby* v. *Barron* [3].

I therefore concur in the reference proposed by my learned brother.

B. Sitarama Rao for Petitioner. Time commences to run only from the expiry of the period fixed. The articles that may be held to apply to the case are arts. 73, 80 and 120. My contention is that article 80 applies. The decisions in *Simon* v. *Hakim Mahomed Sheriff* [4] and *Somasundaram Chettiar* v. *Narasimhachariar* [1] are relied upon against my contention. They support the view that, notwithstanding that a period is fixed for payment, the payee can sue at once. Hence it is urged that limitation commences at once.

[*Chief Justice.*—Do you deny that if the note was endorsed the endorsee could sue at once ?]

I do not deny that a holder in due course can sue at once. What I contend for is, that the agreement is binding on the maker and the payee. In this case the suit is by the payee himself, and, as he is entitled to avail himself of the agreement, limitation commences only from the expiry of the period fixed. S. 32 of the Negotiable Instruments Act provides for a contract to the contrary. That provision was intended to cover a case of the present kind.

As to the English Law on the point, see Smith's Leading Cases Vol. I p. 352 (1911 Edn.) and Judicature Act S. 24 Sub-S. 5. Under the Common Law, an agreement postponing the right to sue could not be pleaded in bar to a suit on a negotiable instrument. But the agreement could be given effect to in Equity, by an injunction restraining the payee from suing. In *Norton* v. *Norton* [5] such an injunction was granted. Now that after the Judicature Act, Courts in England administer both law and equity, a collateral agreement can be pleaded in bar to a suit on the note.

Byles on Bills of Enchange pp. 121, 251.

1. (1905) I. L. R. 29 M. 212. 2. (1718) 1 Sm. L. C. 338 at 352.
3. (1882) 3 M. and W. 210. 4. (1891) I. L. R. 19 M. 368, 374.
5. (1830) 1 Russ and Myl. 178=39 E. R. 69.

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Bower Bank v. *Monteiro* [1], *Maillard* v. *Page* [2].

Darby and Bosanquet on Limitations (1893 Edn.) p. 41.

19 Halsbury p. 173.

[The Chief Justice referred to p. 321 of Byles as being in favour of petitioner.]

The decisions in 19 Mad. and 29 Mad. are not in accordance with the present English Law. The learned judges who decided those cases overlooked the fact that an injunction could be granted. For the English law after the Judicature Act, see also 19 Halsbury p. 55 para 88. Daniel's Negotiable Instruments S. 156. Chalmer's Bills of Exchange Act p. 64. Bhashyam and Adiga Negotiable Instruments Act pp. 445, 450.

The correctness of the decision in 19 Mad. and 29 Mad. is questioned by Bhashyam and Adiga in their commentary on the Act. Stokes in his Anglo-Indian Codes states that the words "contract to the contrary" in S. 32 of the Act were intended to cover collateral contracts. The decisions reported in *Thimbleby* v. *Barron* [3] and *Salmon* v. *Webb & Franklin* [4] are distinguishable as being Common Law cases.

S. Ranganadha Aiyar for Respondents.

Referred to 19 Mad. at p. 372.

[*Abdur Rahim, J.*—Why should not a contract not to sue for a limited time be enforced in the same suit? What is the reason of the rule in India?].

The agreement, if any, must be in the note itself otherwise it cannot postpone limitation. Byles p. 121 shows that when the agreement is in a separate instrument, it is not a part of the note.

Sanjivi v. *Errapa* [5], *Kuttiassan* v. *Suppi* [6].

The Court expressed the following

Opinion:—We agree with Sadasiva Aiyar, J., and for the reasons given by him, that article 80 is the article applicable and that time began to run from the expiry of the period fixed in Exhibit B. Such an agreement to give time is operative in India

1. 4 Taunton 844=128 E. R. 564.
2. (1870) L. R. 5 Ex. 312.
3. (1888) 3 M. and W. 210.
4. (1852) 3 H. L. Cas. 510.
5. (1883) I. L. R. 6 M. 290.
6. (1893) 3 M. L. J. 199.

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under Ss. 62 and 63 of the Indian Contract Act, and is recognised by the Legislature in Article 73 of the Limitation Act which excludes on demand bills and notes from the operation of the article when they are accompanied by any writing restraining or postponing the right to sue. Lastly such agreements appear to be expressly saved by the provision in S. 32 of the Negotiable Instruments Act which provides that notes and bills are payable at maturity according to the apparent tenor of the note on acceptance, only in the absence of a contract to the contrary, thus expressly recognising that such a contract may postpone the date of payment. We think that *Simon* v. *Hakim Mahomed Sheriff* [1], and *Somasundara Chettiar* v. *Narasimha Chariar* [2] proceed on the authority of English decisions which are inapplicable to India and which would appear to be no longer law in England since the passing of the Judicature Act, and that they must be treated as no longer law.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

Muthukrishna Pillai ... *Appellant** (*Respondent in C. R. P. No. 484 of* 1913 *on the file of the High Court*)

v.

M.A. Rajam Aiyengar and others. *Respondents.* (*Petitioners in the said C. R. P. and Party Respondent.*)

Muthukrishna Pillai v. Rajam Aiyengar.

Limitation Act S. 22.—Suit by individual without indicating suit to be on behalf of Company—Amendment subsequently—Not adding new plaintiff.

Where the plaintiff in the original plaint did not say that he was suing on behalf of a Company but on objection being taken by the defendant he stated that he was agreeable that the decree should be in favour of the company and the plaint be amended so that the suit might proceed as being instituted on behalf of the Company.

Held, that the case was not one of adding a new plaintiff within the meaning of S. 22 of the Limitation Act and the suit being in time at the date of the original institution was not barred though at the date of the amendment the limitation period had expired.

Appeal under clause 15 of the Letters Patent against the Judgment of the Hon'ble Mr. Justice Hannay in C. R. P. No. 484

* L. P. A. No. 381 of 1914. 21st October 1915.

1. (1891) I. L. R. 19 M. 368 2. (1905) I. L. R. 29 M. 212.

Muthukrishna Pillai v. Rajam Aiyengar.

of 1913 preferred against the decree of the Court of the Subordinate Judge of Trichinopoly in S. C. S. No. 1579 of 1912.

C. Pattabhirama Iyengar for Appellant.

The Court delivered the following

Judgment:—We have heard the pleaders on both sides relating to this matter, and though the question discussed before us is not entirely free from difficulties, on the whole, we are inclined to take the view of the law applicable to the case, which found favour with Mr. Justice Hannay. We think the question whether the amendment of the plaint as asked for amounts, in law, to the substitution of a new plaintiff, is really covered by the Privy Council decision in *Peary Mohun Mukerjee* v. *Narendranath Mukerjee* [1]. In that case there was a Debutter estate which does not appear to have been properly represented. After the expiration of the period of limitation prescribed for the suit, an enquiry was ordered in order to determine who should be appointed as the shebait so that he may represent the estate; one of the defendants was found to be so entitled, and was impleaded as shebait. It was held by the Calcutta High Court and by their Lordships of the Privy Council that this did not amount to adding a new defendant.

Here, the plaintiff, in the original plaint, did not say that he was suing on behalf of the Reliance Company; and, on objection being taken by the defendant, he stated that he was entirely agreeable that the decrees should be in favour of the company, and that the plaint be amended so that the suit might proceed as being instituted on behalf of the company. We think this is not a case of adding a new plaintiff, for the plaintiff was already on the record, and all he did not make clear in the original plaint was the capacity in which he instituted the suit. We dismiss the appeal with costs.

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1. (1909) I. L. R., 37 C. 229=20 M. L. J. 171.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir John Wallis, Chief Justice and Mr. Justice Seshagiri Aiyar.

R. M. M. S. T. Vyravan Chetty *alias* Somasundaram Chetty. ... *Appellant* in Appeals Nos. 303 and 304 of 1913 and respondent in S. A. No. 1873 of 1913. (Defendant in all).*

v.

Srimath Daivasikamani Natesa Desikar. ... *Respondent in Appeals Nos. 303 and 304 of 1913 and appellant in S. A. No. 1873 of 1913. (Plaintiff in all.)*

Vyravan Chetty *v.* Daivasikamani Desikar.

Practice—Equitable set off—C. P. C. order VIII 3, O. 20 r. 19—Subject to limitation—Landlord and tenant—Claim for damages for obstruction in previous years—Not pleadable if barred.

Apart from special cases like those of mortgagor and mortgagees trustee and cestui-que trust a claim which is barred cannot be the subject of an equitable set off.

Held, accordingly that in a suit for rent by the lessor it was not open to the lessee to plead by way of equitable set off an unliquidated claim for damages for obstruction to quiet enjoyment in previous years which had become barred by limitation.

Appeals against the decrees of the Court of the Temporary Subordinate Judge of Ramnad at Madura in Original Suits Nos. 42 of 1913 and 90 of 1911 and

Second appeal against the decree of the District Court of Ramnad at Madura in original suit No. 585 of 1911 preferred against the decree of the Court of the Temporary Subordinate Judge of Ramnad at Madura in original suit No. 154 of 1910.

A. Krishnaswami Aiyar, for the Appellant.

S. Srinivasa Aiyangar, for the Respondent.

The Court delivered the following

The Chief Justice.

Judgments :—*The Chief Justice.*—The appellant in these cases when sued for rent in respect of faslis 1318 and 1319 set up by way of equitable set off a claim against his lessor, the plaintiff in respect of disturbance of possession in faslis 1313 and 1314. It is well settled in this Court that claims for unliquidated damages may be raised by way of equitable set off if they arise out of the same transaction as the plaintiff's cause of action, but I cannot agree that in a case like this such claim can be so set up even if it was barred at the

* A. Nos. 303 and 304 and S. A. No. 1873 of 1913. 24th September 1915.

Vyravan Chetty v. Daivasikamani Desikar.

The Chief Justice.

date of the suit. It would certainly not be the equitable principle administered by the Court of Chancery to allow the provisions of the statute of limitations to be evaded in this way. The authorities are referred to in the judgment of my learned brother which I have had the advantage of reading. If *Chidambara Mudaliar* v. *Krishnaswami Pillai* [1] is inconsistent with the view I am unable with great respect to follow it. As regards the present case the defendant was in full possession and enjoyment for the faslis in respect of which rent is sued for. Cross claims on account as between mortgagor and mortgagee, trustee and cestui-que-trust and the like stand on a different footing and I do not wish my observation to be taken as applicable to such cases. Otherwise I agree in the order proposed by my learned brother.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.—The point for decision in these appeals is whether in a suit by the lessee for rent it is open to the lessor to plead by way of set off an unliquidated claim for damages which has become barred by limitation arising from obstruction to quiet enjoyment in previous years. My answer is in the negative. Under order VIII Rule 6 of the Code of Civil Procedure, a set off is not permissible, if the money is not *legally recoverable.* This would include all unsustainable claims whether barred by limitation or otherwise. It is no doubt true that this rule applies in terms only to what is known as legal set off. Although in this country it has been held in numerous cases that the Code of Civil Procedure does not prevent the defendant from claiming an equitable set off in respect of unliquidated damages claimable in connection with the transaction on which the suit is brought, I think that on the principle that equity follows the law, the plea will be available only in respect of sums legally recoverable. Lord Norton states the principle very clearly in *Fitton* v. *Macclesfield* [2]. "For when the legislature had fixed the time at law it would have been preposterous for equity (which by its own proper authority always maintains a limitation) to countenance laches beyond the period that law had been confined to by Parliament. And, therefore, in all cases where the legal right has been barred by Parliament the equitable right to the same thing has been concluded by the same bar." Lord Redesdale in *Hovenden* v. *Lord Annesly* [3] expresses himself with equal clearness. "It is said that courts of equity are not within the Statutes of Limitation...............I think it is a

1. (1914) 28 M L. J. 285. 2. (1684) 1 Vernon 287, 293=23 Eng. Rep. 474.
3. 2 Sch. and Lef. 621, 630=9 R. R. 119.

Vyravan Chetty v. Daivasikamani.

Seshagiri Aiyar, J.

mistake in point of language to say that Courts of Equity Act merely by analogy to the statutes; they act in obedience to them. ....I think, therefore, courts of equity are bound to yield obedience to the statute of limitations upon all legal titles and legal demands, and cannot act contrary to the spirit of its provisions." The Indian legislature, it seems to me has recognised this in O. XX R. 19 of the Code of Civil Procedure. Clause (1) of that rule regards the claim to set off as a plaint in a cross suit, and provides for a decree in favour of the defendant. Clause (3) says that this rule is applicable to the plea of set-off under R. 6 of O. VIII or otherwise, thereby indicating that equitable set-off is also within the rule. I am, therefore, of opinion that as the defendant's claim was barred by limitation, the plea of equitable set-off was not open to him. An exception to this rule has been recognised in some cases. Where there is a fiduciary relationship between the parties as in the case of trustee and cestui-que-trust and there is accountability, even barred claims may be taken into account in passing the final accounts. This exception has been extended in some of the decided cases in India to a mortgagee, presumably on the ground that there is accountability between the parties. See *Parasurama Pattar* v. *Venkatachalam Pattar*, [1] *Chidambara Mudaliar* v. *Krishnaswami Pillai*, [2] and *Ramdhari Singh* v. *Permanund Singh* [3]. It is not necessary to state now whether these cases have been rightly decided. I see no reason for extending the exception to suits between a lessor and a lessee.

Regarding the memorandum of objections, we think that the defendant is only entitled to simple interest at 9 per cent. but not to compound interest. The plaintiff is entitled to interest at 6 per cent. on the arrears of rent due to him from the dates on which they fell due. We are also of opinion that the defendant is not entitled to the interest on the sum of Rs. 5,130 found in the previous litigation to be binding on the suit, prior to the death of Thandavaraya Desikar. The decree must be modified by awarding interest only from Fasli 1312. These conclusions are applicable to Second Appeal No. 1873 of 1913. Subject to this modification, the Second Appeal is dismissed. Parties will pay and receive proportionate costs in the memorandum of objections to the two appeals and in the second appeal.

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1. (1913) 25 M. L. J. 561.
2. (1914) 28 M. L. J. 285.
3. (1913) 19 C. W. N. 1183.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
[FULL BENCH.]

Present:—Sir John Wallis, Chief Justice, Mr. Justice Sadasiva Aiyar and Mr. Justice Seshagiri Aiyar.

Pothi Naickan, minor by his next friend K. N. P. R. Narayanaswami Naicker ... *Appellant* * (*Plaintiff*)

v.

K. Naganna Naicker and others ... *Respondents* (*Defendants*).

Pothi Naickan v. Naganna Naicker.

Registration Act Ss. 17 and 49—Partition—Hindu Law—Unregistered deed—Construction—Immovables and movables—Bad as to one, bad as to both—No intention to effect severance without deed taking effect—No division of status by declaration contained in.

In a suit to question an alleged partition between the minor plaintiff and his paternal uncle, the document which was said to effect it was, as follows: "As we have in the presence of undermentioned panchayatdars divided into equal moieties, the cash, movables and immovables, court decrees, etc., of which we are now possessed our connection shall hereafter be only by relationship but we shall have no monetary connection in respect of these properties."

Held, that the document had the effect of causing immovable properties heretofore held by the co-parcener as joint tenants thenceforward to be held by them as tenants-in-common and as such, without registration, could not affect immovable property.

Held also that in the absence of any clear intention expressed in the document that movables should be partitioned apart from the immovables, the document did not affect even the movables.

Held further per *Sadasiva Aiyar, J.* that the unequivocal declaration contained in the document could not also be held to effect a severance as there was no intention to divide without the deed itself simultaneously taking effect.

Appeal under S. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Sankaran Nair and the Hon'ble Justice Oldfield in A. No. 119 of 1912, preferred against the Decree of the District Court of Madura in O. S. No. 12 of 1910.

[See 28 M. L. J. 423 for the Judgment of Sankaran Nair and Oldfield, JJ.]

Exhibit III was in the following terms:—

"Partition deed dated 8th December 1907 effected between us two, namely (Subba Naicker), son of.................. and (2) Pothi Naicken, a minor aged 4, son of K. S. Ramaswami Naicker, represented by his mother and guardian Nagammal, widow of Ramaswami Naicker.................:—

As we have in the presence of the undermentioned panchayatdars, divided, into equal moieties, the cash, movable and immovables, etc., of which we are now possessed, valued at

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* L. P. A. No. 61 of 1915. 10th November 1915.

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Rs. 80,000 our connection shall hereafter be only by relationship, but we shall have no monetary concern in respect of those properties. We shall henceforth enjoy from generation to generation the share allotted to each in the partition, according to our free will and pleasure. To this effect is the deed of partition entered into between us with our consent in the presence of the undermentioned mediators. We shall both jointly execute our court decrees, realize the amounts and divide them. We shall get the pattas relating to the nanjah, punjah, etc., lands allotted to our respective shares transferred to our names separately.

(Signed) K. S. Subba Naicken.

Mark of Nagammal for herself and as guardian of the minor.

Witnesses :—

..................."

Annexed to Ex. III was a schedule of properties, Ex. III A which was found to be not genuine by the District Judge of Madura.

A. Krishnaswami Aiyar for Appellant. I submit that Exhibit III requires registration and is inadmissible without it. Exhibit III purports to be a bi-lateral transaction and if it is inadmissible as such, you cannot read into it a unilateral declaration of intention on the part of Subba Naicken. The schedule to Exhibit III has been found to be not genuine. Where there is no intention to sever as distinct from an intention to divide by metes and bounds and the latter intention fails you cannot impute an intention to the parties to become divided in status alone. Hence Exhibit III cannot be used to prove a severance in status.

Exhibit III is invalid for want of registration. It not merely effects a severance in status but also a division of property. It comes within S. 17 (2) of the Registration Act. The document being inadmissible for the purpose of proving a division, it is equally inadmissible to prove any transaction affecting immovable property (*i. e.,*) change in the character of possession. *Subbiah* v. *Madduletiah* [1], *Keshava* v. *Kumara* [2], *Muthukaruppan* v. *Muthusamban* [3], *Ariyaputhira Padayachi* v. *Muthukumaraswami* [4]. The character of the possession is changed when a joint tenancy is converted into a tenancy-in-common and you

1. (1907) 17 M. L. J. 469. 2. (1905) 15 M. L. J 30.
3. (1914) 27 M. L. J. 497. 4. (1912) I. L. R. 37 M. 423=23 M. L. J. 339.

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cannot prove it by an unregistered document. *Upendranath Banerjee* v. *Umeshchandra Banerjee* [1].

Even if Exhibit III purports to effect a division of status, without more, the document is invalid and cannot be used to prove a division in status. See *Ayyakkutti Mankondan* v. *Periasami* [2]. The view of *Sadasiva Aiyar, J.* in the last mentioned case was upheld by the Full Bench in L. P. A. No. 160 of 1913. If the document is inadmissible, you cannot look into it for the purpose of ascertaining an intention to divide with regard to movables. See S. 49 cl. (*c*) of the Registration Act. *Lakshmamma* v. *Kameswara* [3].

[*Sadasiva Aiyar, J.*—The parties to Exhibit III did contemplate a division of movables as distinct from division of immovable property.]

The conclusion is that there is no division at all. Lastly I contend that the partition under Exhibit III is not binding on the minor, though consented to by his mother.

[*Chief Justice.*—The minor has been deprived of the right by survivorship]

[*Seshagiri Aiyar, J.*—That will be the case in every case of partition where minors are concerned.]

[*Chief Justice.*—You have to look into the circumstances to find out whether the guardian acted in the interests of the minor in consenting to a partition on his behalf.]

A guardian has no authority to effect a partition when it is unfair or prejudicial to the interests of the minors. *Balkishen Das* v. *Ram Narain Sahu* [4], *Parbati* v. *Naunhi Lal Singh* [5]. In the present case it must be conceded that the death-bed partition with Subba Naicker was prejudicial to the interests of the minor.

S. Srinivasa Aiyangar (*G. S. Ramachandra Aiyar*, with him) for the Respondent.

The question whether Exhibits III is invalid for want of registration was not raised in the first court. If it had been raised, I would have adduced other evidence of partition, instead of relying solely upon Exhibit III.

The argument as to want of registration of Exhibit III can have no force. Both the Registrar and the High Court have held that Exhibits III and III (*a*) could not be registered on

1. (1910) 15 C. W. N. 375.
2. (1913) 15 M. L. T. 163.
3. (1889) I. L. R. 13 M. 281.
4. (1913) I. L. R. 30 C. 738.
5. (1909) I. L. R. 31 A. 412.

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account of the bar of S. 21 of the Registration Act. It is only a document that can be registered under S. 21, that must be registered under S. 17 of the Registration Act. S. 9 of the Transfer of Property Act does not require that Exhibits III should be registered. The documents that are hit at by S. 17 of the Registration Act are only those that must be registered under the Transfer of Property Act. I do not rely on Exhibits III as a deed of partition effecting a division by metes and bounds.

Exhibit III is evidence of an award of panchayatdars. It recites a division by them and is admissible as an award without registration. A. S. No. 6 of 1913; S. A 1300 of 1915 and *Tarakant Ghose* v. *Rai Kishore Ghose* [1]. Exhibit III though unregistered is admissible for all purposes except so far as it affects immovable property. It is admissible to prove an admission by the guardian of a prior partition by the panchayatdars. It is admissible to prove a division in status. *Subramania Aiyar* v. *Savitri Ammal* [2] *Parbati* v. *Naunhi Lal Singh* [3] *Kenathi Puthen Vitil Thavazhi* v. *Narayanan* [4]. Unregistered documents like Exhibit III may be used for collateral purposes. *Kattamuri Jagappa* v. *Padalu Latchappa* [5] *Gomaji* v. *Subbarayappa* [6] *Subramaniam* v. *Perumal Reddi* [7] *Pulaka Veetil Muthalakulangara* v. *Thiruthipalli Madhava Menon* [8]. *Hemanta Kumari Debi* v. *Midnapore Zemindary Co.* [9] *Khushalo* v. *Behari Lal* [10] *Nangali* v. *Raman* [11] *Ardesir Bejonji Surti* v. *Syed Sirdar Ali Khan* [12] *Rajah of Venkatagiri* v. *Narayana Reddi* [13] *Mangamma* v. *Ramamma* [14]. Exhibit III at least effects a severance with regard to movables. *Thandavan* v. *Valliamma* [15] *Ulfatunnissa* v. *Hoosain Khan* [16].

The partition is valid irrespective of the consent of the mother, as there is a unilateral declaration of intention to divide under Exhibit III. Even otherwise, it was competent to the mother as guardian to consent to the partition. It is not the duty of the guardian to resist the legitimate demands of the other co-parceners. The partition is valid against the minor. *Balkishen*

1. (1910) 13 C. L. J. 158.
2. (1908) 19 M. L. J. 228.
3. (1909) I. L. R. 31 A. 412.
4. (1904) I. L. R. 28 M. 282.
5. (1882) I. L. R. 5 M 119.
6. (1891) I. L. R. 15 M. 253.
7. (1895) I. L. R. 18 M. 454.
8. (1908) I. L. R. 31 M. 410.
9. (1914) 19 C. W. N. 847.
10. (1881) I. L. R. 3 A. 523.
11. (1883) I. L. R. 7 M. 226.
12. (1908) I. L. R. 33 B. 610
13. (1863) I. L. R. 17 M. 456.
14. (1912) I. L. R. 37 M. 480.
15. (1892) I. L. R. 15 M. 336.
16. (1883) I. L. R. 9 C. 520.

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The Chief Justice.

v. *Ram Narain* [1] *Nallappa* v. *Balambal* [2] Mayne's Hindu Law S. 746. Trevelyan's Hindu Law p. 315.

The Court delivered the following

Judgments:—*The Chief Justice.*—This suit was brought by the minor plaintiff to question an alleged partition under Exhibit III between himself and his paternal uncle Subba Naick in the year 1907. The District Judge dismissed the suit and on appeal his decree was affirmed under S. 98 (2) of the Code of Civil Procedure in accordance with the judgment of Sankaran Nair, J. and Oldfield, J. differing and being of opinion that at any rate as regards immovable property Exhibit III was inadmissible in evidence for want of registration under S. 49 of the Indian Registration Act.

The plaintiff appealed under the Letters Patent and after carefully considering the case we agree with Oldfield, J. that Ex. III in the language of S. 17 (1) of the Act operates to create a right, title or interest, of the value of one hundred rupees or upwards to or in immovable property. The material portion of the document is as follows:—" As we have, in the presence of the undermentioned panchayatdars divided, into equal moieties, the cash, movables and immovables, court decrees, etc.; of which we are now possessed, valued at Rs. 80,000 our connection shall hereafter be only by relationship, but we shall have no monetary connection in respect of these properties." We think this has the effect of causing the immovable properties, theretofore held by the co-parceners as joint. tenants thenceforward, to be held by them as tenants-in-common. Under Section 49 therefore, Ex.III cannot affect such immovable property or be received as evidence of any transaction affecting it.

The further question then arises whether Ex.III is admissible to prove a partition of movables only. It has been held as regards the statute of frauds that the statute operates to prevent an action on a contract though the part of the contract may not be within it. Leake on Contract (3rd Edn.) 252, and Parsons (9th Edn.) Vol. II page 674 citing *Johnson* v. *Johnson* [3] and *Mayfield* v. *Wadsley* [4]. See also *Green* v. *Saddington* [5]. The principle laid down in this case would appear to be that when there is an entire contract and part of it cannot be enforced, the whole goes, whereas, it is otherwise when an instrument contains two or more distinct

1. (1901) I. L. R. 30 C. 738.
2. (1864) 2 M. H. C. R. 182.
3. 3 Bos. P. 162.
4. (1824) 3 B. and C. 357.
5. (1857) 7 E. and B. 504.

contracts in which case they are severable. In *Thandavan* v. *Valliamma* [1], it was held in a case somewhat similar that the contract as regards the partition of immovables might be severed from that as regards movables, but in that case the contract contained separate provisions as to each. In the present case on the whole I have come to the conclusion that there is not sufficient justification for treating Ex. III as consisting of two or more separate contracts. As pointed out by Parsons Vol. II page 673 the question ultimately turns on the intention of the parties and I am not satisfied that there was any intention that the movables should be partitioned apart from the immovables. For these reasons I would allow the appeal and give Judgment for the plaintiff with costs throughout, set aside the decree of the District Judge and remand the case for disposal as regards prayers (d) and (e) of the plaint.

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The Chief Justice.

Sadasiva Aiyar, J.—I agree. Mr. S. Srinivasa Aiyangar for the Respondent further contended that the unequivocal declaration by Subba Naicken in the unregistered deed Ex. III effected a division of status between him and the minor plaintiff. But after a consideration of all the circumstances of this case, I think that the right view to take is that the deceased Subba Naik did not intend such a division in status to take place without the deed itself simultaneously taking effect as a valid division deed, in other words, he never contemplated a division of status unless and until the deed itself is legally capable of effecting such a division. I therefore am unable to uphold that contention of the Respondent's learned Vakil.

Sadasiva Aiyar, J.

Seshagiri Aiyar, J.—I agree and have nothing to add.

PRIVY COUNCIL.

Present :—Viscount Haldane, Lord Parmoor, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.

(On Appeal from the Court of the Chief Commissioner of Ajmer-Merwara.)

Thakur Umed Singh and another ... *Appellants**

v.

Rai Bahadur Seth Sobhag Mal Dhadha and another ... *Respondents*.

Arbitration—Agreement—Guardian-ad-litem*—Signature on application for reference—Arbitrators—Umpire—Award—Ss.* 15 *and* 16 *of Schedule II of Civil Procedure Code of* 1908*—Ss.* 115, 114, 121, *Order* 47 (1) *Schedule I of C. P. Code of* 1908*—Review—Revision.*

Thakur Umed Singh v. Rai Bahadur Seth Sobhag Mal.

*2nd November 1915.

1. (1892) I. L. R. 15 M. 336=2 M. L. J. 130.

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Parties to a suit, one of whom was a minor entered into an agreement signed by all including the guardian-*ad-litem* of the minor to refer the matters in dispute to two arbitrators and in case of difference between them to an umpire, but the application to the Court for reference to arbitration was not signed by the guardian although he was present in Court. The Court made the order for reference to the two arbitrators and on their differing an umpire was appointed. Against his award an application was unsuccessfully made under S. 15 Schedule II of C. P. Code. An application for revision under S. 115 C. P. C. was then presented to the Chief Commissioner and was dismissed. On review however, the arbitration proceedings were set aside by the succeeding Chief Commissioner on the ground that the application for arbitration was not signed by the guardian-*ad-litem*.

Held, that the application to the Court for an order of reference did not require the signature of parties as of necessity and as no injustice was caused to the minor, his guardian being present in Court at the time the application was presented and an assenting party thereto, there was nothing in the technical objection.

Appeal by special leave, heard *ex parte* against the order of the Officiating Chief Commissioner of Ajmer-Merwara dated May 23, 1912 setting aside on review certain arbitration procedings confirmed by the Lower Court and remanding the cause to the Court of the Commissioner and District Judge of Ajmer-Merwara.

A suit was instituted in the Court of the Commissioner and District Judge of Ajmer-Merwara on a mortgage bond for the recovery of a certain sum to which the defence was that the bond was without consideration. By an agreement dated July 31, 1910 the parties agreed to refer the matter in dispute to arbitration. Application was accordingly made before the case was tried for the appointment of arbitrators whose award was challenged on the grounds of the arbitrators proceeding clandestinely without hearing each party, omitting to give notice of their proceedings, if any and failing to give opportunity to one party of producing witnesses. An umpire was therefore appointed to whom the aggrieved party made an application through his pleader with respect to the manner in which the arbitration was conducted and asking him indirectly to take evidence; but he did not do so even though the importance and necessity of so doing was urged upon him. He made his award without taking the said evidence. An application was then made to set aside the award. This was refused. An application for revision under S. 115 of Civil Procedure Code was made but this too was refused. An application for review was then presented to the Court of the Chief Commissioner who ordered the parties to be represented by counsel. The appellants then filed a petition stating that they did

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not wish to be represented. Order was then made on hearing counsel for respondents setting aside the award made by the umpire. The case was remanded to the Lower Court for trial according to law.

De Gruyther, K. C. (with him *Dube*) then applied and obtained leave to appeal to His Majesty in Council.

Dube for the appellants :—The award could only be interfered with under S. 15 of Schedule II of Civil Procedure Code of 1908. By S. 16 of Schedule II the Court was to pronounce the decree in certain cases and it was final when made. Under the old act there was neither an appeal nor revision. It was not necessary for the parties to sign the application for reference to arbitration. In this case the guardian-*ad-litem* was present in the Court.

Reference was made to *Ghulam Jhilani* v. *Mohammad Hossain* [1] and *Hansraj* v. *Sundar Lall* [2].

The respondents did not appear.

The Judgment of their Lordships was delivered by

Viscount Haldane :—In this Appeal the question is whether the Officiating Chief Commissioner of Ajmer-Merwara has properly set aside the award in certain arbitration proceedings. The respondents had brought a suit to recover from the appellants Rs. 88,320 alleged to be due under a mortgage. The appellant first on the record is the father of the second appellant, who was at the time of the proceedings a minor. The Trial Judge appointed one Bhur Singh guardian-*ad-litem* of this minor appellant. Before the trial came on all the parties entered into an agreement to refer the questions in dispute to two arbitrators and, in the event of these differing, to an umpire. The agreement was signed by the appellants and respondents each with his own hand, excepting in the case of the minor appellant, on whose behalf it was signed by the guardian-*ad-litem*. The parties appeared before the Trial Judge and produced the agreement and applied for an order of reference. The guardian-*ad-litem* was present in Court and was a party to the application. The Trial Judge thereupon made an order of reference. The arbitrators differed, and the parties then concurred in an application to refer the dispute to the umpire, and an order was made accordingly.

1. (1901) L. R. 29 I. A., 51.

2. (1903) L. R. 35 I. A., 88.

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The umpire made an award allowing the respondents' claim to the extent of Rs. 17,510 only. This award was filed in Court. The respondents, being dissatisfied with it, applied to the Trial Judge under the provisions of S. 15 of the Second Schedule of the Code of Civil Procedure 1908 to set the award aside. The Trial Judge refused the application. He held that all the parties to the suit, including the guardian-*ad-litem*, had been consenting parties to the application, and further that there was no ground for the objections made on the merits to the award. The order was made under S. 16 of the Second Schedule to the Code already referred to. This section provides that—

"(1) Where the Court sees no cause to remit the award or any of the matters "referred to arbitration for reconsideration in manner aforesaid, and no application "has been made to set aside the award, or the Court has refused such application, "the Court shall, after the time for making such application has expired, proceed "to pronounce judgment according to the award. (2) Upon the judgment so "pronounced a decree shall follow and no appeal shall lie from such decree, "except in so far as the decree is in excess of, or not in accordance with, the "award."

The respondents then presented an application to the Chief Commissioner under S. 115 of the Code of Civil Procedure. This section provides that:—

"The High Court may call for the record of any case which has been decided "by any Court, subordinate to such High Court, and in which no appeal lies "thereto, and if such subordinate Court appears (*a*) to have exercised a jurisdiction "not vested in it by law, or (*b*) to have failed to exercise a jurisdiction so vested, "or (*c*) to have acted in the exercise of its jurisdiction illegally or with material "irregularity, the High Court may make such order as it thinks fit."

The Chief Commissioner dismissed the application. He held that the point taken that the application to the Court for reference to arbitration was not signed by the guardian-*ad-litem*, was not a good one, having regard to the fact that the agreement itself was signed by all parties concerned. Moreover, he thought that it was for the minor or his guardian, and not for the applicants, to raise such an objection. He also held that even if an agreement or compromise entered into on behalf of a minor without the leave of the Court was voidable against all parties other than the minor, that did not make it necessarily void against the minor. As to the merits he was of opinion that there was nothing in the case made for the applicants, the present respondents, based on misconduct or irregularity on the part of the arbitrators and umpire.

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The respondents then applied to the Court of the Chief Commissioner for a review of this order, relying on S. 114 of the Code which, subject to such conditions and limitations as may be prescribed allows a person aggrieved to apply for a review of any decree or order from which no appeal is allowed by the Code, and relying also on Order 47 (1) of the First Schedule to this Code which provides that he may apply for such review on:—

"the discovery of new and important matter or evidence which, after the " exercise of due diligence, was not within his knowledge and could not be pro- " duced by him at the time when the decree was passed or order made, or on " account of some mistake or error apparent on the face of the record, or for any " other sufficient reason."

These rules are, under S. 121 of the Code, to have effect as if enacted in it, until altered as the Code provides.

This application for review was heard, not by Sir Elliot Colvin, the Chief Commissioner, but by Mr. Stratton, who was officiating in his absence. The appellants were not represented on this hearing. The main point urged was that in dismissing the application for review the High Court was in error in regarding the omission to sign the application for arbitration by the minor or his guardian as unimportant, and as covered by the agreement which all the parties had signed. The Officiating Chief Commissioner acceded to the application, and set aside the whole of the arbitration proceedings, on the ground, apparently, that this error in the proceedings, though technical only, was fatal. The only other arguments before him appear to have been that even if the umpire had proper jurisdiction his action was illegal, because he opened the case *de novo*, whereas all he had to do was to consider the points on which the arbitrators had failed to agree, and because he had not taken evidence, although he called for it.

Their Lordships have had to hear the appeal *ex parte*, as the respondents, the plaintiffs in the suit, did not appear on the appeal, but they have examined closely the documents and the various judgments in the Courts below. They are of opinion that the decisions of the Trial Judge and of the Chief Commissioner were right, and ought not to have been interfered with by the Acting Chief Commissioner.

In the first place the Second Schedule to the Code of Civil Procedure, which provides by S. 1 that where the parties to a suit

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have agreed that the matter in difference shall be referred to arbitration they may apply in writing to the Court for an Order of Reference, does not require that the writing should of necessity be signed. As the guardian in this case was in Court and assented to the application it is plain that no injustice has arisen. They think, therefore, that there is no substance in the technical objection relied on. Nor can they find any defect on the face of the award, or any misconduct of the arbitrators or umpire, or concealment of facts by any of the parties which would bring the case within those provisions in the Second Schedule which might enable the Court to set it aside. They have accordingly arrived at the conclusion that the Acting Chief Commissioner was not justified in interfering with the Order refusing revision made by the Chief Commissioner.

They are, therefore, of opinion that the appeal must be allowed with costs here and in the Courts below, and they will humbly advise His Majesty to that effect.

Solicitors for appellants :—*Barrow, Rogers and Nevill.*

PRIVY COUNCIL.

Present :—Viscount Haldane, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the Chief Court of Lower Burma.]

A. K. A. S. Jamal ... *Appellant**

v.

Moola Dawood Sons & Co. ... *Respondents.*

P. C.
Jamal
v.
Moola
Dawood
Sons & Co.

Contracts—Shares—Negotiable security—Sale—Breach—Notice—Damages—Date of breach—Market price—Subsequent rise in price—Indian Contract Act, S. 73.

Under six contracts A contracted with B to sell a certain number of shares on a certain date and in the event of B not buying them, A was to have the option to re-sell the shares by auction and recover from B any loss sustained. On the fixed day A offered the shares which had fallen in value to B and wrote to him adding "Failing compliance with this request by to-day our client will be forced to sell the said shares by public auction on or about the 2nd proximo and hold you responsible for all losses sustained thereby." The purchaser (B) wanted a sum which he claimed to be owing from the seller (A) to be set off against the price demanded and sent a cheque for the difference. The seller then repudiated the claim to the set-off and repeated : We have now to give you notice that our client intends to re-sell these shares and institute a suit against you for the recovery of loss which may result from that course." Thereupon the purchaser stopped payment of the cheque. Negotiations then ensued but ended in nothing. The seller then notified the purchaser of his claim to be paid the difference between the contract price and the market price, by way of compensation and in default of payment, an action was commenced in due course. The shares were sold piecemeal in the course of some months and the sales resulted in a profit.

Held, that in a contract for the sale of negotiable securities the measure of damages for breach was the difference between the contract price and the market price at the date of the breach, that upon breach by the purchaser, his contractual right to the shares fell to the ground and the stipulation for the re-sale was only a mode by which the seller might, if he thought fit, liquidate the damages, by ascertaining the value of the shares on the date of the breach ; that such a sale was not a sale on the purchaser's account, so as to impose on the seller an obligation to account to the purchaser for the price realised ; that in the present case the sale was not one in the exercise of that option ; that although a plaintiff who sued for damages was bound to take all reasonable steps to mitigate the loss caused by the breach and if he could do something or did something on the date of the breach which did or might have mitigated the damages the defendant would be entitled to the benefit thereof but the defendant could not claim the benefit of any subsequent speculation by the seller on his own account inasmuch as he could not be responsible for any loss from such speculation.

Held, further, that S. 73 of the Indian Contract Act was merely declaratory of the right to damages as enunciated above and that S. 107 had no application in the present case.

* 3rd November 1915.

P. C.

Jamal v. Moola Dawood Sons & Co.

Staniforth v. *Lyall* [1], *Yates* v. *Whyte* [2], *Bradburn* v. *Gt. W. Ry.* [3], *Jebsen* v. *E. and W. India Dockca Co.*, [4], *Rodocanachie* v. *Milburn* [5], *Williams Brothers* v. *Agius Ltd* [6], approved.

Appeal from a Judgment and Decree of the Chief Court dated July 24, 1913, affirming a judgment and decree of the same Court (Original Side, dated January 8, 1913.)

The facts material to the case have been sufficiently set forth in their Lordships' Judgment. The material portion of the judgment of the Court of First Instance (Justice Ormond) was as follows :—

"Now we come to the question of damages. The plaintiff sues for the difference between the market rate on the due date (4/3) and the contract rate. Defendant contends that the plaintiff having in his letters expressed an intention of reselling, he (the defendant) is entitled to the benefit of the higher rate at which the plaintiff actually sold. The plaintiff in his letter of the 30th December, Exhibit A, says "Failing compliance with this request by to-day our client will be forced to sell the said shares by public auction on or about the 2nd proximo," and in his letter, Exhibit D of the 2nd January he says "We have now to give you notice that our client intends to re-sell these shares and to institute a suit against you for the recovery of any loss which may result from that course. Unless the price is paid in cash within 7 days from this date our client will proceed to carry out this intention without further reference to yourself", and on the 4th January, Exhibit F he says "Our client will pursue the course indicated in the correspondence." On 26th February (Exhibit 1) his lawyers write "It now appears that no active steps are being taken to settle the matter but that much time is being lost. Our client will therefore now proceed to enforce his rights by suit unless the sum of Rs. 1,09,219-6 is paid to him by way of compensation before the end of this week." * * * * "Plaintiff's counsel informed me that the market rate on the 26th February was 4/3, that is, the same as on the due date. One of the "rules" on the back of the contract notes states that in default of payment for the shares on the date of settlement or by noon on the day following, the seller shall have the option of re-selling the shares by auction at the Exchange at the next meeting, and any loss arising shall be recoverable from the buyer. The plaintiff had no other right of re-sale beyond that."

1. (1830) 7 Bing 169, s. c. 131 E. R. 65.
2. (1838) 4 Bing. N. C. 272, s. c. 132 Eng. Rep. 793.
3. (1874) L. R. 10 Ex 1.
4. (1875) L. R. 10 C.P. 300.
5. (1886) 18 Q B. D. 67.
6. (1914) A. C 510 H. L.

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"At the time that he first gave notice of his intention to re-sell he still had that right, but he subsequently failed to exercise it, that is, though he has sold these shares at a higher rate than the rate of the due date, he did not purport to resell them as against the defendant." "Can then the defendant firm claim to have the benefit of the higher prices realised by the plaintiff? I think they can. If a seller, having the right of resale, elects to exercise such right, he must give notice of his intention to resell, and having done so he has made his election between the two measures of damages that were open to him." "After giving such notice, it is his duty to re-sell either at the time (if any) appointed by the contract or within a reasonable time after the date of the breach. If he delays, he takes upon himself all risk arising from further depreciation. And if he sells at a higher rate, such sale will be taken to be a resale in pursuance of his notice; for otherwise he would be allowed to benefit by his own wrong".

The decision of the first Court was confirmed on appeal, though on different grounds, as will appear from the following extract from the appellate Judgment:—"There is no doubt as to what appellant's true measure of damages is. It is the difference between the contract prices and the market prices when the contracts ought to have been completed, that is, in this case the date of the breach the 30th December 1911 for the appellant could then have taken the shares into the market and obtained the current price for them. This was the principle followed in the case of *Pott* v. *Flather* [1]. But it was argued that as in the beginning appellant chose to proceed under S. 107 of the Indian Contract Act he should be kept to such choice".

"It is clear that though at first he expressed the intention of pursuing the course set out in S. 107 he did not keep to his intention for, when he brought his suit he had only sold 100 shares and this was on the 28th February and he sued for his whole measure of damages. Appellant's Counsel urged that though appellant at first expressed the intention of following the course laid down by S. 107, he was not bound to carry out such intention and could change his mind if he liked. This view appears to be correct. The words of S. 107 are permissive and not compulsory. In the case of *Buldeo Doss* v. *Howe* [2] the view was taken that S. 107 does not deprive an unpaid vendor of goods of any other remedy he may have. I am therefore unable to agree with the views expressed by the learned Judge on the Original Side as to appellant being bound to proceed under S. 107".

"But I think that there is abundant authority for holding that the respondents are entitled to the benefit of the higher prices realised by appellant in mitigation of the sum payable by them as damages.

1. (1847) 16 L. J. Q. B. 366. 2. (18[illegible]) I. L. R. 6 C. 64.

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The subject is dealt with at pages 771 and 772 of Leake on Contracts 6th Edition and page 207 of Mayne on Damages 8th Edition."

"I would especially refer to the following cases. In *Oldershaw* v. *Holt* [1] where the plaintiff claimed as damages certain monies from the defendant owing to his failing to carry out certain terms of a building lease and where plaintiff entered into a new agreement with another tenant the jury were directed to have regard to the new and ultimately more advantageous agreement entered into in calculating the amount of damages due. In *Smith* v. *Mc'Guire* [2] which was a suit to recover damages for failure to carry out the terms of a charter party, that is, to load a ship with a cargo of oats, Baron Martin said "It would be doubtful whether a party who breaks a contract has a right to say to a person with whom he breaks it "I will not pay you the damages arising from my breach of contract, because you ought to have done something else for the purpose of relieving me from it." I am not satisfied that the person who breaks a contract has a right to insist on that at all; but if the ship had earned anything the defendant would be entitled to a deduction in respect to that." Again in *Brace* v. *Calder* [3] where the plaintiff was employed by the defendants, a partnership consisting of four members, as manager of a branch of their business and the agreement was that he was to be employed for a certain period, but before that period had expired two of the partners retired and the business was transferred to and carried on by the other two; in an action for wrongful dismissal it was held that the plaintiff was only entitled to nominal damages as the continuing partners were willing to employ the plaintiff on the same terms as before for the remainder of the period and so the plaintiff would have suffered no damage. In that in the present case the appellant reduced his loss by selling the shares at a higher price than obtained at the date of the breach, I think it only equitable to give the respondents the benefit of the higher prices realized. I would therefore dismiss the appeal with costs."

Sir Erle Richards and *F. J. Coltman* for the appellants:—We claimed as damages the difference between the contract price and the market price on the date of breach. I submit to your Lordships that is an absolutely well founded elementary proposition of the law of damages, but the Court of Appeal have said that that is not the measure of damages, that you must look and see what the seller does afterwards with the shares. My position is that I could have held on to those shares or sold them all at once, or do as I did, nurse them and sell them in small quantities afterwards; it was nothing to do with the buyer after breach; my damages, as I submit to your Lordships were fixed at that time.

1. (1840) 12 A. & E. 590=11 L. J. Q. B. 221. 2. (1858) 27 L. J. Exch. 465. 3. (1895) 2 Q. B. 253.

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Lord Wrenbury :—He may take the shares as his own and sue for the difference as damages, and then he may do what he likes with the shares.

Sir Erle Richards :—Yes ; that is what I did ; after I started the suit claiming the difference between the contract price and the price at the date of breach as damages, I sold them off in small quantities. The first lot I sold at a loss, at lower than the market price on the date of the breach ; then there came a small rise and eventually I got rid of them at an average price which was higher than the marke price on the date of breach. Now the Court of Appeal have said that I have got to give credit for the profits that I made upon that. I am going to submit to your Lordships that it is a simple proposition of law that the measure of damages is what I have said, namely, the difference between the contract price and the market price on the date of breach. That is so, as I shall submit under the Indian Contract Act and under the Indian Law and all the authorities.

Lord Haldane :—The whole question is whether you have to give credit for the profit you made on the resale of the shares ?

Sir Erle Richards:—That is the whole point, and it is a very short one. Perhaps before I turn to the Act, I might give your Lordships the few facts which are material (Counsel then referred to the contracts, the correspondence between the parties after the breach and the pleadings. This is one of them.

There are some rules on the back but I shall only refer to the third one " Settlement.—Day shall be fixed at the time of dealing. On such settlement day all shares shall be delivered by the seller to the buyer who shall pay for the same on the same day or at latest by 12 noon on the day following. In the event of such payment not being made the seller shall have the option of re-selling the shares by auction and any loss arising shall be recoverable from a buyer". There has been a difference of opinion about this between the two Courts. That gave me, if I liked to exercise it, an option of selling the things at once by auction, and if I had done that I should have realised a much less price.

Lord Wrenbury:—It does not say "at once". There are no words "at once"; it is "reselling the shares by auction."

Sir Erle Richards:—Yes " and any loss arising shall be recoverable from the buyer." That is an option. Then there is another form of contract. " In the event of a seller not delivering his stock on the settlement day, or by 12. noon on the day following at latest, the buyer shall have the option of buying the shares at auction at the Exchange at their next Meeting, and any loss arising shall be recoverable from the seller". That is a little different. The dates of delivery, as your Lordships will have observed, were some on the

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30th December and some on the 31st December, but it so happened that the 31st December was a Sunday.

Lord Wrenbury:—I suppose the position is that on the 30th December you were entitled to take either of two courses; you could have said, I shall keep the shares and charge you the difference between the contract price and the market price and these properties will be mine; you could have said. The shares are contractually yours: I am going to avail myself of a clause in the contract and sell them; that must mean: I am going to sell them as yours; the man does not want authority to sell his own shares; if he is going to re-sell he sells the risk to somebody else.

Sir Erle Richards:—Would it be quite so? Was not the auction option a way of fixing the damages? The shares could not have held to be passed.

Lord Wrenbury:—The legal title would not pass; I said "Contractually"

The view of the contract note, which I submit for your Lordship's consideration is that it is giving a remedy to the seller if he likes to settle the damages.

Lord Haldane :—An extra remedy?

Sir Erle Richards :—An extra remedy, and it is certainly a severe remedy; of course he may not have the money to hold the shares.

Lord Haldane :—Your point is that there are two remedies. One which the ordinary law gives, the difference between the market price and the price fixed by the contract, and the other the loss on the resale, and that the second is an option?

Sir Erle Richards :—Yes.

Lord Haldane :—Otherwise you would be wrong; if you were bound to the second alternative, then you would have to give credit for the profit on the sale.

Sir Erle Richards :—If I am bound to sell by auction; but I did not; I never sold by auction.

Lord Wrenbury :—May it be stated thus, whether on the 30th you said, I elect to hold you bound to take the shares and sell them as yours?

Sir Erle Richards :—If I had broken off here, I quite see I should have to meet those arguments, but my submission is if your lordships will read the two or three more letters you will see it went off, and whatever we were going to do there, we fell back on the Common Law remedy of selling and taking the market price.

Lord Wrenbury :—You say on the 26th February, we are not going to assert that the shares are yours and going to re-sell them for you; you said you could say that, and the other side said you could not; you said I am now going to say the shares are mine and claim

upon you upon the footing that they became mine on the 30th of December, and assess the damages at that date, and now I sell them for myself.

Sir Erle Richards:—That is my simple position, and I stand upon that.

Lord Haldane:—You say they have nothing to do with these transactions.

Sir Erle Richards:—No, I need not trouble about them, and I do not say anything about them except this general observation that we got them off in the market between two days after the date of our letter the next date was after we began our suit when we sold at 4/- and the last lot were realised in October of that year.

Lord Haldane:—What was the date of the suit?

Sir Erle Richards:—The 22nd of March, and the second sale was on the 4th of April. Supposing we realised a less price than 4/3 should we be entitled to recover it from them?

Lord Haldane:—Your case is the whole of the relations between you and the purchaser came to an end on the date of due delivery.

Sir Erle Richards:—Yes, that is it. I have various remedies and I have adopted this one.

Lord Haldane:—The purchaser's point must be that by giving notice to re-sell you took a particular step and could not go back from it.

Sir Erle Richards:—That is the point of the Lower Court; the Appeal Court will not have that point on the facts, but they go further and say, even if you relied upon your common law right of realising, the damages were not what you say, the difference on the date of breach, but the Court ought to go behind that and see what you did afterwards. I challenge that absolutely as a proposition of law.

Lord Wrenbury:—It depends whether what you did afterwards was done with your own property or somebody else's.

Sir Erle Richards:—Yes, I should have thought it was quite clear under the Indian Contract Act. As to the election, I say it does not arise upon the facts.

Sir J. Edge:—According to the Court of Appeal, if the shares had gone up above the contract price by the middle of January, you would not have been entitled to any damages at all.

Sir Erle Richards:—Yes, I took the risk of the speculation myself.

Sir J. Edge:—That is the point in the Chief Court.

Sir Erle Richards:—If the shares had fallen a great deal, would I be able to recover the loss from them?

Those, my Lords, are the two points.

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Lord Haldane :—You say the effect of the breach of the contract was that the shares became the plaintiff's own, free from any contract, to re-sell them as he pleased.

Sir Erle Richards :—Yes, they always were his, but he was relieved of any contractual obligation. The whole thing was at an end, and his position only was that he had a claim for damages.

Lord Haldane :—You say the rules on the back of the contract note gave him an extra option to treat them as the defendant's, which he did not do.

Sir Erle Richards:—Yes, as some method of realising the damages, but he did not do it.

Lord Haldane :—What does S. 107 of the Indian Contract Act say?

Sir Erle Richards :—S. 107 is a section which gives the seller who has a right of lien or stoppage *in transitu*, a right of sale.

Mr. Ameer Ali :—When the buyer refuses to take?

Sir Erle Richards :—That comes at the end of a series of sections which deal with the seller's lien.

Lord Haldane :—The buyer must bear any loss under that, but is not entitled to any profit.

Sir Erle Richards :—Yes, and the buyer is not entitled to any profit which occurs by such re-sale.

Lord Haldane :—I suppose that means he is to get the benefit of any profit in diminution of loss which diminishes what otherwise would be the loss.

Sir Erle Richards :—I think I should have to say that would not be a loss.

Lord Haldane :—I think that is only what it means.

Sir Erle Richards:—It is only where there is a right of lien or stoppage *in transitu*. It was on that point that I asked your Lordship to glance at the sections before that, which begin at S. 95. It is a budget of sections beginning with "Seller's lien" and it deals with what lien a seller has. If your lordship passes on, you come to the seller's right of stoppage *in transitu* or stoppage in transit, as it is called in the Indian Act. I think that begins at S. 99.

Lord Haldane—Does this apply to shares?

Mr. Ameer Ali—To everything.

Lord Haldane:—If so, there is a lien on shares for the price.

Sir Erle Richards:—If the property has passed, but I do not think the property has passed. With great respect I doubt whether S. 107 applies to this case at all.

Lord Haldane:—I suppose you say that no property ever passed, and there was no question of lien.

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Lord Wrenbury:—Where the seller is in peril he is protected by a lien on the goods or by a right of stoppage *in transitu*, but this seller never sold the shares or parted with them; they were registered in his name.

Mr. Ameer Ali:—Does the Indian Contract Act make any difference with regard to property?

Sir Erle Richards:—I do not think so. Shares are included in the definition of goods. I think the whole point is covered by S. 73.

Lord Haldane:—You have a lien when the goods are *in transitu* or when in the seller's hands still.

Sir Erle Richards:—Then he gets a statutory right to sell, but it does not apply to the ordinary case of non-delivery at all.

Lord Wrenbury:—Assume for a moment that it does apply, the section provides that the buyer is not entitled to make a profit.

Mr. Ameer Ali:—Any profit over and above the contract price.

Sir Erle Richards:—I think that must be so

Lord Haldane:—It would hit you if that section applied, because you would have to give credit for the diminution in loss occasioned by the shares being sold at a profit.

Sir J. Edge:—It would wipe out a great part of the damage; the buyer then would only lose if the seller made any loss on the result.

Sir Erle Richards:—I have a considerable balance that I have recovered, at any rate. What I say is that S. 107 has nothing to do with it, and does not apply at all; and as my learned friend, Mr. Coltman, is good enough to point out, it has always been construed that S. 107 is an alternative remedy which you can apply if you like * * *. Now may I make one general observation before I read the cases? (referred to by the lower court.) They are cases of a wholly different character. One is a case of wrongful dismissal, where a man was dismissed two years before the expiration of his contract, and the Court said you must not take as damages all the profits he would have derived, the payments for his services for those two years, because he has his personal freedom for those two years, and you must find out what that is worth and deduct that. These are all cases with reference to a contract which is running on.

Sir J. Edge:—The charter party case has nothing to do with it.

Sir Erle Richards:—The rule, I submit, is perfectly clear where you have a mercantile security.

Lord Haldane:—There is apt to be a good deal of confusion in dealing with these cases on the measure of damages; for instance, certain special rules have been laid down in the case of a breach of covenant to repair or to carry out the terms of a building lease. Again, in some of the shipping cases and charter party cases a different rule has been

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laid down. The whole matter came before the House of Lords in a case I remember of the *British Westinghouse Electric & Manufacturing Co. Ltd.* v. *The Underground Electric Railway Companies of London Ltd.*, [1] where we examined the question as to when you can take mitigating circumstances into account in estimating the measure of damages.

Sir Erle Richards :—May I remind your Lordship of a later case in which your Lordship gave Judgment, *Williams* v. *Agius* [2] ?

Lord Haldane :—That was a case in which we considered in the House of Lords the rule in *Rodocanachie* v. *Milburn* [3]; that is the other way round. That is a case where a man contracts to buy and sues for breach of contract to sell to him, and it is held that the measure of damages is what he has to pay in the market of the day on which he gets the goods; that is not to be interfered with by anything subsequent. There are special cases dealt with in the earlier case in the House of Lords of the *British Westinghouse Company* v. *The Underground Railways* [1]. You say it is the analogy of *Rodocanachie* v. *Milburn* [3].

Sir Erle Richards :—It has always been laid down quite clearly, I submit it has, that in dealing with the breach of contract of sale of a mercantile security you go by the market price and have the damages at the time.

Lord Haldane :—You cannot lay it down rigidly ; in the case in House of Lords it was held that the British Westinghouse Company contracted to supply certain motors to the Metropolitan Electric Railway Company and they had broken their contract, they had not supplied the quantity in time; thereupon the Electric Railway Company were really very glad, because they discovered in the meantime that there were other motors which had been invented since and put on the market which very greatly reduced the working cost, and the breach of their contract enabled them to refuse to go on with the Westinghouse Company and to buy the other motors, which saved them a great deal of money. The breach of contract was a great profit, and we held that must be taken into account because the transactions were so interconnected.

Sir Erle Richards:—I remember that case and I have it here.

Lord Haldane:—That was an exception to the general rule. We said there were other exceptions; a covenant to repair, for instance, stood on a different footing.

Sir Erle Richards:—The landlord may have pulled down his house, but he is entitled to recover.

1. (1912) A. C. 673.
2. (1914) A. C. 510.
3. (1886) 18 Q. B. D. 67.

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Lord Haldane:—We held, you take that into account; we did not touch the ordinary rule in *Rodocanachie* v. *Milburn* [1], the action for the sale of goods; in *Williams* v. *Agius* [2] we affirmed that.

Sir Erle Richards:—I am obliged to your Lordship; I do not know that I need discuss it further, because I submit to your Lordships that *William* v. *Agius* [2], affirmed the rule, and your Lordship in that case affirmed the Judgment of Lord Esher in a case called *Rodocanachie* v. *Milburn* [1].

Lord Haldane: —That as I said, was the other way round.

Sir Erle Richards:—Yes, but it is still the same principle, I thought perhaps the one way of putting it is, that where you have got a perfectly clear case of market value, then you have got your damages absolutely ascertained, in the case of the motors, and so on, but where you have got no market value you have to look at something which will help you to find market value. I might begin the submission I wish to make on the point of law by referring to the Indian Contract Act, which of course governs here, and I submit it put the rule quite clearly if your Lordship would be kind enough to refer to S. 73 of that Act. I shall submit to your Lordship that Westinghouse is on another point.

Lord Haldane:—I do not suggest it is not, but what I want is to get the principle quite clear. It is not the case that in every instance of delivery you have simply to look at the price in the market and compare it with the other price; there are exceptions, and in the Westinghouse case one of the exceptions was recognised. That does not at all necessarily touch the cause you are dealing with. This is the way it was laid down on page 688 [Reads 1912 A. C. 673.]

In that case we examined a number of decisions and distinguished them; I need not read it all, but you will notice what is said there. We say there "The cases as to the measure of damages for breach of a covenant by a lessee to deliver up the demised premises in repair illustrate yet another class of authorities in which the qualifying rule has been excluded." What we held in that case was it being the natural and reasonable course for the Railway Company as business people to get new motors at once, and they having made a profit in so getting it, the situation was analogous to what would have been your situation if the shares had gone up in value and there was no damage. I do not think this affects the rule in *Rodocanachie* v. *Milburn* [1] at all; it was not intended to.

Sir Erle Richards;—I submit it was not intended to, and your Lordship will not forget that you re-affirmed *Rodocanachie* v. *Milburn* [1]

1. (1886) 18 Q. B. D. 67. 2. (1914) A. C. 510.

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two years afterwards, in *Williams* v. *Agius* [1] in 1914 Appeal Cases at page 510. The real point was somewhat analogous to this in this general way that the question was whether the measure of damages was to be the difference between the contract price and the market price or whether you had to look at what happened with regard to resale, and so on. It was complicated by the question whether some of the parties had made contracts varying their liability; there was a question of fact about a contract given by a broker Ghiron, and it was very complicated.

Lord Haldane:—The pivot is in the last few lines of the first part of the headnote. A contracted to sell to W and W contracted to sell to somebody else, and the question was whether damages ought to have been paid by A to W.

Sir Erle Richards —May I say on this case that Lord Haldane, I think, has summed up this point at page 520? I am rather anxious to avoid the other question; that deals with the question about the broker's authority. If you would kindly turn to page 520 you will see Lord Haldane, says this:—[reads]

Lord Haldane:—My recollection is that Lord Moulton put it very concisely at page 530.

Sir Erle Richards:—I was going to ask your Lordship to refer to that.

Lord Haldane:—"If these were the only facts of the case the contention of the respondents would be precisely that view of the damages in the case of an article purchaseable in the market which was negatived by the decision in *Rodocanachie* v. *Milburn* [2]. That case rests on the sound ground that it is immaterial what the buyer is intending to do with the purchased goods. He is entitled to recover the expense of putting himself into the position of having those goods, and this he can do by going into the market and purchasing them at the market price." You see what I said was this; the goods are not delivered, the buyer cannot come and say in making his claim, before the date of delivery I sold them at a higher price and I lost profit by the non-delivery. On the other hand the seller is not entitled to say: The buyer has sold at a loss and that is to be taken into account on the other side.

Sir Erle Richards:—I was going to read that, but I should have begun a little earlier on page 530, where his Lordship says. "Inasmuch as this is a plain case of a failure to deliver a specified quantity of an article obtainable in the market, the measure of damages is well established. The case comes under the rule laid down in the case of *Rodocanachie* v. *Milburn* [2] and regularly and repeatedly followed ever

1. (1914) A. C. 510. 2. (1886) 18 Q. B. D. 67.

since, and ultimately embodied in the Sale of Goods Act 1893 S. 51, sub-section 3". I do rely upon *Rodocanachie v. Milburn*[1] because that was the case where the question was whether it was the market value of the goods; it was a case of a purchaser not getting delivery, but the same principle must apply, I suppose.

Lord Haldane:—They are all subject to what was said by Lord Justice James in the *Dunkirk Colliery* v. *Lever*[2] quoted in the Westinghouse case, that the business man, when a business contract is broken, must do the best he can to diminish the loss. In your case you say you did the best, which was to go into the market on the day when delivery ought to have been taken of the shares and to sell them, and you did that. That is your case. Then as I say according to *Rodocanachie* v. *Milburn*[1] and those other authorities, the defendant had nothing whatever to do with what you did subsequent. That is the way you put it?

Sir Erle Richards:—Yes, and I say that *Rodocanachie* v. *Milburn*[1] is in my favour on that view, and *Rodocanachie* v. *Milburn*[1] has the authority of the House of Lords. Now, my Lords, might I call your attention to the sections of the Indian Contract Act? I want to refer to S. 73.

Sir J. Edge:—I suppose a higher measure of damages might exist than the market price, if one man had said to the other, I want to buy 500 tons, or whatever it may be, to deliver under a contract at such and such a price that I have already got. That would be a different case.

Sir Erle Richards:—That was the case of the shoes going to Paris.

Sir J. Edge:—The market price would not come in there and you have given notice.

Sir Erle Richards:—Yes, however, let me read S. 73.

Mr. Ameer Ali:—What was the meaning of your two letters, that you were going to re-sell them? Will you explain that before you read the section.

Sir Erle Richards:—Frankly I stand on my letter of the 26th February.

Mr. Ameer Ali:—You do not stand on the previous letters?

Sir Erle Richards:—No. I now stand on my letter of the 26th February. These negotiations were going on and I took action on the 26th February. Would your Lordships look at S. 73 of the Indian Contract Act? It is Act IX of 1872; it is headed "Of the consequences of breach of contract." [reads S. 73.]

Lord Haldane:—That is the principle recognised in the Westinghouse case.

1. (1886) 18 Q. B. D. 67. 2. (1878) 9 Ch. D. 20.

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Sir Erle Richards:—Yes.

Sir J. Edge:—Also the ship case; they sent the ship to New Zealand and with a homeward charter party and the charterer refused to take her at New Zealand, the owner did not send the ship home empty ; he got another voyage.

Lord Haldane:—And as they did make a profit it was a diminution of the damages.

Sir J. Edge:—The charter cases do not apply.

Lord Haldane:—Just as in the Westinghouse case the Railway Company got a great advantage, you might, if the shares had gone up very much on the day you resold, because your business was to get the best price on that day.

Sir Erle Richards:—Then I should have had nothing to complain of, but I chose to take the speculation myself. Would your Lordship kindly look at the first illustration to S. 73. [reads illustration A].

Lord Haldane:—That is *Rodocanachie* v. *Milburn* [1].

Sir Erle Richards:—Yes, but I submit to your Lordship it covers my case precisely; it says you are to take the market price.

Lord Wrenbury:—This is the vendor.

Sir Erle Richards:—Yes, but I think there can be no difference.

Lord Wrenbury:—I do not say there is, but it is not this case.

Lord Haldane:—It is just the other way on.

Sir Erle Richards:—The same measure of damages must surely apply as between vendor and purchaser. Perhaps I might read Sir Frederick Pollock's note upon this : he has written a book upon the Indian Contract Act.

Sir J. Edge:—Is it usual to refer to a living author in that way ? We have hesitated to adopt it here.

Sir Erle Richards:—Then I will not read it. There is always a difficulty about applying that rule here, for instance, Mr. Mayne is fortunately still alive.

Lord Wrenbury:—Counsel is always capable of getting over that; he says, I am not going to read it as Sir Frederick Pollock's opinion, but I will take this as part of my argument.

Lord Haldane :—It is not right to read the text-books of living authors, but if there is any point you can give it to us as part of your argument.

Sir Erle Richards :—It is only saying just what I have said, that the market price is to govern, and he quotes authorities some of which I can refer to. I submit that covers my case absolutely.

Lord Haldane:—The illustrations C and D seem to be very much in point.

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1. (1886) 18 Q. B. D. 67.

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Sir Erle Richards:—I was going to read those: [reads.]

Lord Haldane:—You say the principle upon which all those sections rest and upon which *Rodocanachie* v. *Milburn* [1], rests is not a denial of what Lord Justice James said about there being the duty of the person whose right is violated to take such reasonable steps as he can to mitigate the damage to the person who has broken his contract, but they rest on this that it is the proper course for a person who has contracted to sell goods and whose goods have not been accepted to go into the market as soon as he learns that the contract is broken and to re-sell the goods: then he discharges the duty of mitigating loss as far as he can, and when he has done that he can recover the difference and will have to account for the profit if perchance he has made a profit.

Sir Erle Richards:—That is all his duty and all he has to do in the way of mitigating damages in that case where there is a market.

Lord Haldane:—After that if there has been a sale which is quite unconnected with this transaction, or if there has been an opportunity of sale quite unconnected with the transaction, it does not come into account.

Sir Erle Richards:—That really is my whole position. I have read illustration (C) but I think your Lordships will have noticed illustration (D) also.

Mr. Ameer Ali:—At what intervals did you sell the shares?

Sir Erle Richards:—The sales went on right up to November, in the year of action; your Lordships will find it on the last page of the record.

Sir J. Edge:—I should like you to draw attention to illustration (D).

Sir Erle Richards:—I was going to read that: [reads].

Lord Haldane put it that the prudent man who has to realise then has done his duty so far as mitigation of damages is concerned, and he has no other duty. In other cases he may have to do more, but when you have the case of a marketable security, it is a thing that has a price in the market and his only duty is to realise then.

Lord Haldane:—If he makes losses by holding on after the date of the breach of contract he cannot recover the extra loss.

Sir Erle Richards:—No.

Lord Haldane:—It seems to me all the Chief Justice says is, he gives illustrations of certain cases where the duty of the plaintiff was held to have bound him to take a course which led to mitigation, which mitigation reduced the damages.

Sir Erle Richards:—Yes, I should rather like to refer to the first case he cites, because it is a case which is cited in the

1. (1886) 18 Q. B. D. 67.

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books; it is a decision of Lord Denman, Mr. Justice Patteson, Mr. Justice Coleridge and Mr. Justice Erle. It is the case of *Pott* v. *Flather*, which he mentions on page 60, line 4, it is reported in 16 Law Journal, Queen's Bench, at page 366. This is a case the Chief Justice greatly relied upon and I submit it is in my favour. The headnote is this: "Plaintiffs, on the 20th of October 1845, sold the defendant twenty railway shares at 25s premium, no day being mentioned for the delivery of the scrip. On the 21st of October the shares had fallen to 14s premium, and on that day, but after business hours, the defendant gave the plaintiffs notice that he should not take the shares. On the 22nd the shares were at 8s premium, and the price continued to fall till the 6th of December, when the plaintiffs sold the shares at 17s, discount. An action being brought for breach of the defendant's contract:—Held, that the proper measure of damages was the difference in price between the 20th and 22nd of October." There was a case where the vendor held on for a time and a loss resulted, and they held he could not recover. Mr. Justice Patteson on page 368 says: "In an action for not delivering, the plaintiff is not bound to purchase other goods, and yet the measure of damages must be the difference in price between the time of the contract and the time of the delivery. But here you can hardly contend that you might wait for any period in order to sell. If the shares had risen in value, and there had, therefore, eventually been a profit on them, your argument would go to show that the defendant could have sued the plaintiffs for the difference. If the plaintiffs could wait for any time in order to see how the market would turn, the reciprocity would be all on one side." The Judgments are not reported, but it came to this, that they allowed damages as on the date of the breach and said that must be the rule.

Lord Haldane:—I suppose what they have said against you here is, you did not sell upon the day when the shares should have been taken. You said, my rights are ascertained, henceforth we treat the shares as ours, they have never been appropriated to you, they are our shares, you sold them afterwards and you put the money in your pocket. The question is whether that is so connected with the original transaction and arises out of it that it can be deemed to be part of it. That is an instance of the Westinghouse case.

Sir Erle Richards:—Yes, I submit it does not and that clearly was not the suggestion of the defendants in his written statement, but I submit I have no obligation to sell at all.

Sir J. Edge:—Some of these shares are sold actually in the August and October following.

Sir Erle Richards:—We sold some in the month of May. We were able to nurse these shares; the first lot we sold at a loss.

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Sir J. Edge :—You sold in July, again in August and again in October.

Sir Erle Richards :—Yes. My Lords, I have very little more to say ; I think I have made my point. I submit the business of a vendor of marketable securities when his buyer will not accept—I take that case in order to eliminate other questions, is this : he can do what he likes with the shares ; he is not bound to sell them at all. For the purpose of assessing the damages you assume that he has sold ; that is for the purpose of getting the measure of damages, because that is what I apprehend we must do to mitigate the loss, but he is not bound to sell ; it was open to him to hold them to this day if he liked ; there is no obligation on a man to sell at all, and it is said in one of the cases if he does not sell and loses on the risk he cannot recover it from the buyer. The positions as between him and the seller are fixed once and for all on the result which a prudent man would have obtained if he sold on the day of the breach. That is the whole point, I think.

Lord Wrenbury :—The proposition is this, is it not : Breach of contract by purchaser ; the vendor says, I agree there has been a breach of contract, contractually these shares were yours, the purchasers, but you have broken it, they are not yours now, they are mine ; they are mine, and I have also a right in damages against you. I have two things, first, the shares, and secondly, a right in damages, and as from that moment the shares are his and not the purchaser's. If they go up, so much the better for him ; if they go down, so much the worse for him ; that is his affair.

Sir Erle Richards :—Yes.

Lord Haldane :—And in estimating the damages he is bound to do what a prudent person would have done at the date of the breach. He can, say it is only a question of estimating the damages ; that is my claim for damages and I limit it to that, and then the shares being his by a transaction quite unconnected with the contract of sale, if he makes a profit or makes a loss, so much the worse for him in the second case, so much the better for him in the first case.

Sir Erle Richards :— Really that is my main point.

Sir J. Edge :—You sold in April under the market price of the 30th December ; you are not claiming the loss on that.

Sir Erle Richards :— No.

Sir J. Edge :—In April you sold at 4s.

Sir Erle Richards :—Yes.

Sir J. Edge :—The market price at the time of the breach was 4/3 ; you would not be entitled to claim the extra 3d.

Sir Erle Richards :—No.

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Lord Haldane :—Where there is a profit arising by something done naturally in the same transaction, as, for instance, what the Railway Company did in the Westinghouse case, or as, for instance, what was done in *Staniforth* v. *Lyall*, where the charters did not take delivery of the ship when it arrived in New Zealand and where the owner made the other voyage and made profit, there you must bring that into account, but when you have sold or estimated your loss on the day on which the contract is broken, then you have done all that a prudent person is called on to do; you have fulfilled your duty, henceforth the shares are yours and you claim the damages. That is your argument.

Sir Erle Richards :—Yes. I say of course if there was a profit arising from what a prudent man would have done in mitigation of damages in selling, I must give credit for that, but as I took the course I did, my case is that the whole matter is crystallised on the day of the breach and you have only to look at what a prudent man would do. I submit whether he elects to hold them or give them away or sell them are not matters you should take into consideration in estimating the measure of damages. I submit that is fixed once for all by the market value on the day of the breach.

Mr. Coltman :—My Lords, I only desire to add a very few words to what my learned leader has said, and those few words will be addressed to S. 73 of the Indian Contract Act and the illustrations. I desire to point out that if the Judgment of the appellate side of the Chief Court of Lower Burma is right, that will make it necessary to add further provisions to S. 73, because that would involve this, that in every case you would have to make an enquiry as to what the plaintiff had done with the goods or the shares which he had retained right up to the date of trial, instead of ascertaining the damages in the way set out in the section. That would certainly be a surprising doctrine to introduce, certainly in India, and I think here. As I say it would really make these illustrations entirely inconclusive illustrations: (c) would have to be qualified by saying that that would be the measure of damages provided the seller had not at any day before the trial in fact sold the goods for a higher price than the market price on the day of the breach. With regard to the question of his suggested doctrine of election in this case I would only say one word, and that is, that it was not proved or suggested that the defendant was in any way prejudiced by the change of mind on the part of the plaintiff, because the market price was the same.

Lord Haldane :—I do not quite know what election means. When a man has two alternatives and is bound to one or other of those alternatives and has to elect between them and he cannot have both

then he elects for one and he may be held to that, but here you say, I suppose, that in no sense is this a case of election.

Mr. Coltman :—I do say in no sense is it a case of election, and on that my position is strengthened because it cannot be suggested that my change of mind in any way prejudiced the defendant.

Lord Wrenbury :—Cannot this point be put somewhat in this way: Under the contract the buyer was entitled to do something and he elected and said I am going to do it, but did not, whereupon the purchaser says, I am entitled to the profit of your doing something else. I do not see much sequence of argument in that. It is quite true he said, I am going to re-sell, and if he resold he had to re-sell by auction, but he never did re-sell, by auction. What happens? It is said, because he re-sold somehow else I am entitled to the profits.

Lord Haldane :—He was under no obligation to sell by auction and he put himself under none.

Mr. Coltman :—If your Lordships please. That is all I have to say.

Mr. Frank Dodd for Repondents :—I would call your Lordships' attention to what would be the effect, I can only point it out as a consequence, of a successful appeal in this case, namely, that a very well-known rule of law would be entirely broken because the rule of law in this and all Courts is that the damages for the breach of a contract, especially of a mercantile contract, must be such a sum as will compensate the person against whom the breach has been made for any loss or damage which he has suffered and which naturally flowed from the breach.

Lord Haldane :—But you must have some day at which the settlement is ascertained.

Mr. Frank Dodd :—I am going to suggest that, I am not endeavouring to evade it, there must be a date.

Lord Haldane :—I only took exception to your statement of the principle because the date is the material point, and you did not mention the date.

Mr. Frank Dodd :—I was going to say a reasonable date is an absolutely essential point. I cannot go on and assume that because the man took the shares to himself and kept them for a twelve-month and then, and then only, was able to make a profit, that I am entitled to come at the end of that period and say that part of that profit belonged to me and was mine.

Lord Haldane :—Any more than he would be entitled to claim the loss if he waited twelve-months and made a loss?

Mr. Frank Dodd:—Exactly so. There is no dispute about the breach on the 30th or 31st December, the due date; there can be no dispute

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about the intention of the appellant after the date, it is manifested by his letters which go on to the 4th January ; I am treating these shares as yours, I am going to treat them as yours and exercise the power which is given to me under the contracts, I am going to follow that course. Let me read the exact words :—I will follow the course indicated in the correspondence. The letter of the 2nd January says "We have now to give you notice that our client intends to re-sell these shares and to institute a suit against you for the recovery of any loss, which may result from that course". And seven days are given to us. At that time the position was this; he thought, and clearly I think rightly thought, that the shares were mine, contractually at all events, because not only had he tendered, as he says, the certificates, but he tendered to us duly executed transfers which of course would be sufficient to give us a complete contractual right to them, and he just says : Now I am going to sell the shares. Then there comes a period from the 4th January to the 26th February. We have no direct evidence as to what took place between those times, but we have the suggestion perfectly clearly made that there were negotiations between the respective parties. I should not have said there was no evidence because Sir Erle Richards called your Lordship's attention to the passage in the evidence of Mr. Dawood which pointed to there being negotiations at that time. That carries us down I submit to the 26th February. On the 28th February he begins selling, so the moment when the parties were finally at issue on this transaction, as far as one can see, was the 26th February. There is a sale within two days. I submit that is a sale within the expressed intention of the earlier letters and not within the letter which says. We are going to exercise the right of selling and cutting the contract as it were, taking the matter into our own possession and treating the things as our own goods and claiming against you on the market rate.

Lord Haldane :—You reminded me that the date of due delivery was the 30th December, the date on which the first actual sale was made was what ?

Mr. Frank Dodd :—The 28th February.

Lord Haldane :—More than two months later ?

Mr. Frank Dodd :—Exactly two months later.

Lord Haldane :—The damages claimed of course are on the 30th December, as ascertained on that date ?

Mr. Frank Dodd :—Yes.

Lord Haldane :—Now there were sales upon the 28th February : what do you say about that ?

Mr. Frank Dodd :—There was one in March : the proceedings commenced in March, and I say all these proceedings, certainly up to the proceedings on the 22nd March, were proceedings pursuant to the

notice given on the 30th December and repeated down to the 4th January pending the negotiations which had been taking place between the parties.

Lord Wrenbury :—The 26th February was quite the other way. On the 26th February the vendor in substance said: I am not going to sell, I am going to claim the difference between market price and contract price against you on the 30th December?

Mr. Frank Dodd :—The letter says so; at that time I suggest he had no right to go back: I want to suggest that.

Lord Haldane :—You are going to put the case, I understand it in this way, that the duty of a prudent man was to take whatever was the right course. On the 30th December he might, if he had liked, have said: I will take the market value and claim on that footing, and if I suffer loss subsequently that is for me to bear, not for the defendant. But he may also say: The prudent course to take is to hold the shares and watch my opportunity; it is better for you and me that I should do that, and then he subsequently sells; you have to make out that it is *mutu contextu* with the original transaction.

Lord Wrenbury:—Do you say he said, I am going to hold the shares and sell them for your benefit only if the market rises?

Mr. Frank Dodd:—I cannot say he said that.

Lord Wrenbury:—He said, I am going to sell by auction on the 2nd, three days hence.

Mr. Frank Dodd:—Then on the 4th January he said, We shall follow the course indicated, but did not; there were negotiations going on for the purpose so far as I can make out, until the 26th February.

Lord Haldane:—I do not think he is to be tied to his statement that he was going to sell by auction, except as an admission that that was a course, a reasonable and prudent man would have taken; he was under no contract or duty.

Lord Wrenbury:—His understanding of it was, he said, I am going to sell by auction, and I apprehend if you could say if he had sold by auction he would have got 5/6, then you would have a very good case.

Mr. Frank Dodd:—I am not bound to use the words "by auction". By his contract he is limited to auction. By the 107th section of the Indian contract Act he is entitled to sell, which is another different matter. Certainly the learned Judge in the First Instance seems to have been clearly of opinion that what they were doing was a sale under the 107th section. The Officiating Chief Justice mentions it in his Judgement. My point is this, if there was a time limit of sales of any kind at all it was clearly passed over until the 26th February. I think the sale in November is shown on the other side to have been of a large block of shares part of which shares were Mr. Jamal's which had

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nothing to do with this transaction. There were 1299 out of the last block in November; that admittedly had nothing to do with this.

Sir J. Edge :—When do you say these people ought to have sold?

Mr. Frank Dodd :—They could not sell while negotiations were going on.

Sir J. Edge :—If there were no negotiations going-on when must they have sold?

Mr. Frank Dodd :—If there had been none they should have sold on the day after the 4th January ; they could have done.

Sir J. Edge :—They might have endeavoured to sell at once.

Lord Haldane :—On the 30th December.

Mr. Frank Dodd :—I should say they could have sold on the 1st January.

Sir J. Edge :—It is not disputed that the difference between the market price and the contract price on the 1st January is 4/3.

Mr. Frank Dodd :—May I correct myself; they could not have sold on the 1st January because three of the contracts were made pursuant to the Rules of the Rangoon Stok Exchange and they had to wait till the next sale day on the Stock Exchange.

Mr. Ameer Ali :—On the 4th January they gave seven days by the letter.

Mr. Frank Dodd :—Yes, after that they seem to have negotiated, and certainly while negotiations were going on they could not have possibly sold.

Sir J. Edge :—I am not so sure of that. When do you say they were bound to sell?

Mr. Frank Dodd :—Bound to sell at any reasonable time after the parties were completely at issue.

Sir J. Edge .—At any reasonable time after the issue was joined in this suit.

Mr. Frank Dodd :—No after the parties were at issue and it was obvious a settlement could not be arrived at.

Sir J. Edge :—They were at issue on the 26th of February.

Mr. Frank Dodd :—On the 28th of February these gentlemen started and sold some.

Lord Haldane :—Is it your case that they got into negotiations and they came to an agreement that what a prudent person would do would be to negotiate and not sell on the 30th of December or immediately thereafter, but to go on and wait for an opportunity? Is that your case?

Mr. Frank Dodd:—I would like your Lordships, if I dared, to accept that as my case; but I dare not say that to your Lordships.

Sir J. Edge:—I want to understand your case. On your case if the market price of the shares had fallen to 3/-on the 28th of February,

would they have been enabled to claim the difference between the 3/ and the 12/-from you ?

Mr. Frank Dodd:—I think so.

Lord Haldane:—You must say that.

Mr. Frank Dodd:—I do say it.

Lord Haldane:—Then you get so very near all the things that were put by Lord Justice Brett in *Rodocanachie* v. *Milburn* as difficulties.

Mr. Frank Dodd:--The question is if there is a breach of a contract and by a course of contract between the two parties the date for determining the right which accrued upon the breach of contract has been postponed, on whichever side it falls, that postponement is an element which must be considered in the judgment. It is perfectly clear in this case that 4/3 was the price on the 28th of February and it was on the 30th of Dcember.

Lord Haldane:—Now, just let us see, to get it distinctly what happened; shall we take your case on the documents on the letters ? In the letter of the 30th of December the Solicitors say that the seller will be forced to sell the shares by public auction on or about the 2nd proximo ; that is the proposal but they did not do that.

Mr. Frank Dodd:—He could not unless there was a public auction sale.

Lord Wrenbury:—It is "on or about."

Mr. Frank Dodd:—There is to be a public auction sale in three of the contracts.

Lord Wrenbury:—He says he will sell on or about.

Mr. Frank Dodd.—Yes.

Lord Haldane:—You said he could not sell on the 2nd.

Mr. Frank Dodd:—He would have to wait until there was a sale. I admit his right to sell if there had been no negotiations pending on the 1st January if she had the means of complying with the contract.

Sir J. Edge :—Where do you raise this point in your written statement ?

Lord Haldane :—He does not raise it.

Mr. Frank Dodd :—No I do not raise it.

Lord Haldane:—Anything that is argued, we will take as open on the somewhat general terms of the written statement. You did not raise that.

Mr. Frank Dodd :—No.

Sir J. Edge :—You simply deny the proposition of the other side, you put them to proof.

Mr. Frank Dodd :—According to the rules of pleading, we never plead to damages.

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Sir J. Edge:—I am perfectly well aware of that: You were pleading an alternative arrangement by which his right to charge you with a breach of contract was postponed. Where did you plead that?

Mr. Frank Dodd:—It is not pleaded.

Sir J. Edge:—That you would have to plead; that would be a confession and avoidance, would it not?

Mr. Frank Dodd:—I doubt whether it was a material plea, with the pleadings put in, as they were after the matters had been going on.

Sir J. Edge:—It probably would have been material to the decision of the case, but you now alleged that owing to some arrangement or negotiation going on between them he could not elect to treat the contract as broken on the 30th of December: he would have to wait until after the 26th of February.

Mr. Frank Dodd:—I have not made myself clear. I admit it was broken, but that there were negotiations going on between the parties which suspended his right to exercise the powers which were given to him consequent upon the breach of the contract. That there was a breach on the 30th of December I cannot dispute for a moment. If there had been no negotiations, I have admitted he could have sold on the 1st of January, but negotiations seem to have been continued. We have it from the letters and from the evidence of Mr. Dawood that the negotiations continued, as I understand, until the 26th of February.

Sir J. Edge.—Up to the 26th of February do you say you were entitled to say to these people: Give me delivery of these shares?

Mr. Frank Dodd:—Yes.

Sir J. Edge:—And say I will pay you the contract price?

Mr. Frank Dodd:—Yes, absolutely. He had not claimed that they were his and said he rescinded the contract, and I had a right to go to him.

Sir J. Edge:—Does it matter whether he claimed the shares as his or not? He had made his tender on the 30th of December and you refused to take delivery according to the contract; you declined to take it.

Lord Haldane:—He set up another case which is pleaded as a counter-claim against him on account of the rice transactions.

Mr. Frank Dodd:—Yes.

Lord Haldane:—There is correspondence on that, and then that is dropped.

Mr. Frank Dodd:—Yes.

Lord Haldane:—Then I cannot find anywhere any bargain between you which obviated the formality of the tender which was to treat the shares as sold by him upon the 30th of December.

Mr. Frank Dodd:—As long as the shares were in his possession, as long as any goods sold or shares sold are in the vendor's possession

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and have been appropriated to the vendee, and the vendee comes and tenders the money which is due, it may be with any extra expense of warehousing or any extra interest or any costs or anything of that kind, the vendee is entitled to take possession.

Sir J. Edge :—Do you mean that for 12 months after this breach of contract your client could have gone to the vendor and said: Here is your money, give me the shares ?

Mr. Frank Dodd :—No, that is an unreasonable time.

Sir J. Edge :—What do you call a reasonable time ? What is the length of the reasonable time that he would have to wait in this case after the 30th of December ?

Mr. Frank Dodd :—Seven days ; at that time if he had chosen to exercise his powers and we had never got negotiating, that would have been enough. I am not disputing that.

Mr. Ameer Ali :—Would you turn to the letter of the 26th of February ? I should like to understand what that means. What does he expect the defaulting vendee to do ?

Mr. Frank Dodd :—" We are instructed by Mr. A. K. A. S. Jamal that he has not hitherto taken any steps to enforce his claim against you for failing to pay for and take delivery of 23,500 shares in the British Burma Petroleum Company Limited at your request in order that his claim might if possible be settled. It now appears that no active steps are being taken to settle the matter but that much time is being lost. Our client will therefore now proceed to enforce his rights by suit unless the sum of Rupees 1,09,219-6 paid to him by way of compensation before the end of this week." That is calling upon me to pay a sum which he assesses as his loss in damages on that date.

Sir J. Edge :—I daresay he would have given you the shares if you had paid him the money, but was he bound to ? If the vendee refuses to take delivery of the shares according to his contract and wants to set up some other contract between the parties which is not the contract which exists, is the vendor bound to hold his hand and hand over the shares whenever the vendee chooses to come ?

Mr. Frank Dodd :—No, but is that this case ? My client never set up any different contract with regard to these shares.

Sir J. Edge :—You could not carry out commercial transactions on that basis.

Mr. Frank Dodd :—Lord Haldane calls attention to the fact that, he sets up he had the claim in respect of the rice transactions, and he wanted to set off one payment against the other ; he sent his cheque to pay for the shares.

Sir J. Edge:—He apparently had a claim whether good or bad, against another firm ; the people he had the claim against were the other firm.

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Mr. Frank Dodd:—Mr. Jamal is a member of the other firm; they were endeavouring to settle it whatever it my be. There is no suggestion of bad faith on either side with regard to this transaction.

Sir J. Edge:—I do not suggest bad faith.

Mr. Frank Dodd:—Whatever the ground was, it was discussed. It was sufficient to keep negotiations pending until the 26th of February. If that date was the date when as Messrs. Giles and Coltman write and say, you not having paid for these shares now and not having taken delivery of them as we have been expecting you to do up to the present time, we now claim to exercise our rights which are given us and we claim against you now for the first time to say it is the difference between the contract price and the market price...............

Sir J. Edge:—They are only claiming what the price was on the 30th of December and what the price was in the following April.

Mr. Frank Dodd:—It is the same price; they do not even claim that as the 30th of December price.

Sir J Edge :—Oh yes, they do, if you look at the plaint.

Mr. Frank Dodd:—The 26th of February letter does not say so.

Sir J. Edge:—Look at the plaint.

Lord Wrenbury:—They claim 4/3.

Mr. Frank Dodd:—That is so. The claim is made on the 22nd of March in that form. On the 26th of February the price was 4/3. If that was the date on which their right to re-sell, as I submit it was clearly admitted, was determined to be exercised, I put it all these sales subsequently to that which followed, there were a good many in April and all at a considerable increase of price, were sales which were within the principle of the cases in which credit has been given for an enhanced price after breach of contract because it goes in mitigation of damages and in reduction of the sum payable to the person whose contract has been broken, as the amount of the loss which he has in fact suffered. In this case the result of this appeal, if successful, will be to give Mr. Jamal 30,000 rupees more than he has in fact suffered loss; he will have that amount of money.

Lord Wrenbury:—When he took the course he did, he took the risk of sustaining a loss of 30,000 rupees if the market went the other way. The whole question is: Is it his adventure or the defendant's adventure ?

Mr. Frank Dodd:—I quite agree, if I may respectfully say so. The question is when did he take the risk? He did not take it immediately at all events; he covered his loss, and made a profit immediately if he was holding us liable.

Lord Wrenbury:—Did not he at least take it when he said on the 26th of February. What I claim against you is to take the shares and

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you pay me the balance; I ascertain my damages? That is surely the substance of that letter; they were his shares then, were they not?

Mr. Frank Dodd:—It is a coincidence that it was the same market price as on the date of the breach. I submit he was regarding it as the market price on that day, and the price at which he was selling the shares. I put that as being the point and the principal thing. I know the mere consequences in the matter would not appeal to this Board if the law is correct, but I submit that the law is not correct in saying what is the sum which ought to have been awarded. The learned Judge of First Instance and the Court of Appeal below, although giving different reasons for it, were both striving to the same end, that is to give to Mr. Jamal the exact sum which he was entitled to as the damages which had been caused to him by the breach of contract of which undoubtedly Mr. Dawood had been guilty.

My Lords, I do not want to go through the cases with regard to that, and I agree, if I may respectfully say so, with the suggestion that this is a case which might be discussed purely and simply according to the Indian Law, and in that Indian Law at all events the rule as to contract price and market price has not been so embodied as it has been embodied into the English Law, because you cannot find that rule in any part of the Indian Contract Act although it appears in its double form in S. 50 and 51 of the English Sale of Goods Act 1893. Certainly the rule which was commonly regarded as a rule between vendor and purchaser but which is not in fact a rule between vendor and purchaser *Rodocanachie* v. *Milburn*[1] was dealing with a ship under a charter where the merchants did not get it—and that is the damage which Lord Esher was assessing in that case and which no doubt is the correct measure of damage in such cases—has not got into India; in India you must come according to S. 73. I will not ask your Lordships to let me read that again because you have already heard it. That only says that he shall have the damages which reasonably and naturally follow from the purchase without any assistance of a fixed rule that *prima facie* the damages are to be calculated as the difference between the two respective prices. This is absolutely and definitely fixed as the first thing to be considered by any tribunal and if you remember the date of the judgment, which is in December, long after the whole of these sales had been passed, I submit with great respect any Judge charging an English Jury in a similar case to this would have called attention to the fact that this man had made these profits and the Jury might have had that question put to them.

Sir J. Edge:—He probably would have landed them in the Court of Appeal.

1. (1886) 18 Q. B. D. 67.

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Mr. Frank Dodd:—No, if he called the attention of the Jury to the question as to whether or not the man had taken these over as his own shares and took his own risk; I think he would not have landed them in the Court of Appeal if he had called the attention of the Jury to that or if the Judge acting as a Jury in this case properly directed himself or called attention to the fact that this sum which they awarded, the absolute loss out of pocket, was the real measure of damages which Mr. Jamal the Appellant here had suffered.

(Their Lordships conferred.)

Lord Haldane:—Sir Erle Richards, we need not trouble you to reply.

Their Lordships will make their report in due course.

The judgment of their Lordships was delivered by

Lord Wrenbury:—Under six contracts made at various dates between April and August 1911 the plaintiff (the appellant) was seller to the defendants of certain 23,500 shares at prices amounting in the aggregate to Rs. 184,125. 10. The date for delivery was the 30th December 1911. The contract notes contained a term providing that in the event of the buyer not making payment on the settlement day the seller should have the option of re-selling the shares by auction, and any loss arising should be recoverable from the buyer. In some cases the words ran: "by auction at "the Exchange at the next "meeting," &c.

By the 30th December the shares had fallen largely in value. On that day the vendor tendered the shares and asked payment of the price, adding: "Failing compliance with this request by "to-day our client will be forced to sell the said shares by public "auction on or about the 2nd proximo, responsible for all losses "sustained thereby." The purchasers did not pay the sum demanded. They set up a contention that the seller was indebted to them on another transaction, and they sent cheques for the differential sum of Rs. 75,925. 10, and called for a transfer of the shares. On the 2nd January 1912 the seller repudiated the claim to a set-off, and repeated: "We have now to give you "notice that our client intends to re-sell these shares and to insti- "tute a suit against you for the recovery of any loss which may "result from that course." The purchasers stopped payment of the cheques, and nothing turns upon the fact that they were given.

Negotiations ensued between the parties which extended to

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26th February 1912. On that day the seller, by his agents, wrote to the purchasers a letter as follows :—

"71 Phayre Street, Rangoon,
"26th February 1912.

"Messrs. Moolla Dawood and Sons.

"Dear Sirs,

"We are instructed by Mr A. K. A S. Jamal that he has not hitherto taken "any steps to enforce his claim against you for failing to pay for and take delivery "of 23,500 shares in the British Burma Petroleum Company, Limited, at your "request, in order that his claim might, if possible, be settled. It now appears "that no active steps are being taken to settle the matter but that much time is "being lost. Our client will therefore now proceed to enforce his rights by suit "unless the sum of Rs. 1,09,219. 6 is paid to him by way of compensation before "the end of this week.

"The amount claimed is arrived at by deducting Rs. 74,906. 4, the value of "23,500 shares at 4s. 3d., from Rs. 1,81,125. 10, the agreed price of the shares.

"Yours faithfully,
"GILES AND COLTMAN"

The 4s. 3d. a share there mentioned was the market price of the shares on the 30th December.

On the 22nd March the seller commenced a suit to recover Rs. 1,09,218. 12 as damages for breach measured by the difference between the contract price of the shares and their market price (4s. 3d. a share) on the date of the breach, the 30th December 1911. This is (with a trifling variance the same sum and arrived at in the same way as the Rs. 1,09,219. 6 mentioned in the letter.

Immediately after the letter of the 26th February 1912, viz. on the 28 February, the seller commenced to make sale of the shares. He sold them all at various dates from the 28th February onwards. In one case the sale was at less than 4s. 3d. (viz., at 4s) In one case it was at 4s. 3d. In every other case it was at a higher price.

The decision under appeal is one which gives the purchaser the benefit of the increased prices which the shares realised, by giving him credit in reduction of the damages for the increased prices in fact realised over the market price at the 30th December, the date of the breach. The appellant contends that this is wrong.

Their Lordships will first deal with the contractual term as to re-sale. Upon breach by the purchaser his contractual right to the shares fell to the ground. There arose a right to damages, and the stipulation in question was in their Lordships' opinion only a stipulation that the seller might, if he thought fit, liquidate the damages by ascertaining the value of the shares at the date of the breach by an auction sale as specified If the seller availed

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himself of that option he was not selling the purchaser's shares with a consequential obligation to account to him for the price but was selling shares belonging to the seller which the purchaser ought to, but failed to, take up and pay for in order to ascertain what was the loss arising by reason of the purchaser not completing at the contract price. Their Lordships are unable to agree with the original Judge that the plaintiff's letters of the 30th December and 2nd January amounted to an election to take a measure of damages to be arrived at by a re-sale. Moreover, there never was any sale by auction under the option. Nothing turns upon this provision as to re-sale.

The question therefore is the general question and may be stated thus : In a contract for sale of negotiable securities, is the measure of damages for breach the difference between the contract price and the market price at the date of the breach—with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach—or is the seller bound to reduce the damages, if he can, by subsequent sales at better prices ? If he is and if the purchaser is entitled to the benefit of subsequent sales, it must also be true that he must bear the burden of subsequent losses. The latter proposition is in their Lordships' opinion impossible, and the former is equally unsound. If the seller holds on to the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer, the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises.

It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss *at the date of the breach.* If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it. *Staniforth* v. *Lyall* [1], is an illustration of this. But the fact that by reason of the loss of the contract which the defendant had failed to perform the plaintiff obtains the benefit of another a contract which is of value to him, does not entitle the defendant to the benefit of the latter contract. *Yates* v. *Whyte* [2], *Bradburn* v.

1. (1830) 7 Bing, 169. 2. (1838) 4 Bing, N. C. 272,

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Great Western Railway [1], *Jebsen* v. *East and West India Dock* ,

The decision in *Rodocanachie* v. *Milburn* [3], that market value at the date of the breach is the decisive element, was upheld in the House of Lords in *Williams* v. *Agius* [4]. The breach in *Rodocanachie* v. *Milburn* [3] was breach by the seller to deliver, but in their Lordships' opinion the proposition is equally true where the breach is committed by the buyer.

The respondents further contend that S. 73 and S. 107 of the Indian Contract Act, or one of them, is in their favour. As regards S. 107 their Lordships are unable to see that it has any application in the present case. It deals with cases in which a seller has a lien on goods or has stopped them *in transitu*. The section follows upon sections dealing with those subject matters. The present case is not one which falls under either of those heads. The seller was and remained the legal holder of the shares.

As regards S. 73 it is but declaratory of the right to damages which has been discussed in the course of this judgment.

Their Lordships find that upon the appeal the officiating Chief Judge rested his judgment on a finding that the seller reduced his loss by selling the shares at a higher price than obtained at the date of the breach. This begs the question by assuming that loss means loss generally, not loss as the date of the breach. The seller's loss at the date of the breach was and remained the difference between contract price and market price at the date. When the buyer committed this breach the seller remained entitled to the shares, and became entitled to damages such as the law allows. The first of these two properties, viz., the shares, he kept for a time and subsequently sold them in a rising market. His pocket received benefit, but his loss at the date of the breach remained unaffected.

Their Lordships will humbly advise His Majesty that this appeal ought to be allowed, and the orders in the original court and in the Appeal Court discharged, and judgment entered for the plaintiff according to his plaint, and that the respondent ought to pay the costs in the courts below and of this appeal.

Solicitors for appellant:—*Arnould & Son.*

Solicitors for respondents :—*Bramall & White.*

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1. (1874) L. R. 10, Ex. 1.
2. (1874) L. R. 10, C. P. 300.
3. (1886) 18 Q. B. D. 67.
4. (1914) A. C. 510.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—The Hon'ble Mr. Justice Sadasiva Aiyar and the Hon'ble Mr. Justice Napier.

Sarakki Abdul Rahiman Taragan and another. *Appellants* in both (Defendants)*

v.

Muhaidin Pathumal Bivi and another ... *Respondents in both (Plaintiffs).*

and

Sarakki Abdul Rahiman Taragan and another. *Appellants† in both (Defendants)*

v.

Pathummal Bivi ... ... *Respondents in both (Plaintiffs).*

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Limitation Act, Art 120, 62—*Suit for partition—Mortgage-debt collected by co-heirs—Mahomedan Law—Right of suit from day to-day.*

In a suit for partition by a Mahomedan lady against her co-heirs one of the reliefs claimed was in respect of the amount of a mortgage debt due to the deceased collected by the defendants more than 6 years before suit.

Held that Art. 120 and not Art. 62 applied to the case and as the right to sue accrued from day to-day, the action was not barred.

Second Appeals against the decrees of the District Court of Tinnevelly in A. S. No. 39, 56, 38 and 47 of 1914 preferred against the decrees of the Court of the District Munsif of Tinnevelly in O. S. No. 259 and 260 of 1911.

M. D. Devadoss, for Appellant.

T. R. Ramachandra Aiyar, T. R. Krishnaswami Aiyar, and *N. A. Krishna Aiyar,* for Respondents.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments:—*Sadasiva Aiyar, J.*—These four connected Second Appeals have arisen out of two connected suits brought by three Mussalman ladies—one of the suits was brought by two sisters against their two step-brothers and their mother for partition of the properties of their father (including the accretions to the said properties) and the other suit was by the mother of the plaintiffs in the first suit against her said step-sons (the same defendants 1 and 2) for her share. The father died in February 1898 and these suits were brought in July 1911.

The Lower Appellate Court modified the order of the Court of First Instance in the plaintiffs' favour on the plaintiffs' two appeals and dismissed the two appeals of the defendants 1 and 2 preferred

* S. A. No. 2275 to 2278 of 1914. 27th October 1915

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to the Lower Appellate Court against those portions of the decrees of the District Munsif which were in the plaintiffs' favour. Hence the defendants have now filed these four second appeals. The step-sisters and the step-mother of the appellants have also filed two memoranda of objections in two of the four second appeals because the Lower Courts did not give them their shares in the house standing on the site in Schedule 1 and also gave certain vague directions regarding the mode of partition of that site.

The second appeals 2276 and 2278 may be disposed of at once. In these two second appeals the defendants 1 and 2 contend that the plaintiffs ought to have been made liable for their shares of the debts alleged by the defendants to be family debts and also of the expenses alleged to have been incurred by the defendants out of their own pocket for the marriage expenses of their step-sisters. Both the Lower Courts have found that the marriage expenses were incurred out of the profits of the plaintiffs' shares in their father's properties and the alleged family debts either do not exist or were not incurred for purposes binding on the plaintiffs. These are findings of fact which are binding upon us in second appeal. Further, the learned District Judge says that "the findings of the District Munsif as to the debts were not seriously attacked" before him. These second appeals therefore are dismissed with costs.

The two remaining second appeals 2275 and 2277 are directed against the award to the plaintiffs of their shares in two sums of Rs. 1,000 and 900 which were received by the defendants 1 and 2 from the mortgage debtors of their father in 1904 and 1909 respectively. The attack is based on three grounds :—

(1) That as the plaintiffs did not claim any shares in the amount of Rs. 1,900 in their plaints as originally framed but claimed only shares in certain immovable properties alleged to have been purchased with the aid of Rs. 1,900 the Lower Appellate Court was wrong in allowing the plaints to be amended by claiming a share in the sums themselves and in awarding such shares (the plaintiffs having failed to prove that the immovable properties were purchased with the aid of the Rs. 1,900.

(2) That even if the amendments were properly allowed, the Lower Appellate Court ought to have granted to the defendants 1 and 2 a further opportunity to meet the plaintiffs' case after such amendment.

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(3) That the plaintiffs' claims for shares in the sum of Rs. 1,900 are barred by limitation.

I think there is nothing in the first two contentions. The amendments were, in my opinion, rightly allowed (Or. 6 R. 17). The defendants 1 and 2 in the 12th paragraph of their written statement contended that much more than the value of the plaintiffs' shares in these amounts and in the other properties of their father had been spent for the plaintiffs. The 11th issue also was framed on this plea of the defendants and they let in all their evidence on that issue. I agree with the remark of the Lower Appellate Court that "it was quite open to them" (that is, the defendants 1 and 2) "to have shown already what they did with these moneys and I am afraid it would be nothing but a direct incitement to perjury if I allowed them to adduce fresh evidence at this stage."

Coming to the third ground of attack, so far as the Rs. 900 received by the defendants 1 and 2 in 1909 is concerned, the suits cannot be barred by limitation as they were brought in 1911. Mr. Devadoss therefore fairly admitted during the concluding portion of his arguments that his plea of limitation should be confined to the sum of Rs. 1,000 received by the defendants 1 and 2 in 1904.

As regards this sum of Rs. 1,000 the Full Bench decision in *Khadersa Hajee Bappu* v. *Puthu Veettil Ayissa Ummah* [1] is binding upon me. The following observations occur in that judgment. "In the case of a Mahomedan dying intestate, the estate is at once vested in the heirs as tenants-in-common."

"The answer to the question referred" (namely, what is the article applicable to a suit by one of several Mahomedan heirs for a share of the intestate's property in the possession of another sharer) must be that article 120 is the article applicable "when the property is movable property."

Article 120 provides a period of 6 years' limitation for a suit for which no period of limitation is provided elsewhere in the first schedule (which first schedule relates to suits) and the time from which the period begins to run is mentioned as "when the right to sue accrues."

The next question, therefore, which has to be considered is whether the right of the plaintiffs to sue their Mussalman co-heirs

1. (1910) I. L. R. 34 Mad. 511=20 M. L. J. 288 F. B.

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for their (the plaintiffs') share of the intestates' properties accrued within 6 years of this suit. If the phrase "the right to sue accrues," be interpreted as meaning "the right to sue *first* accrues," there can be, no doubt, that the plaintiffs' right to recover their shares in the Rs. 1,000 accrued in 1904 as soon as the defendants 1 and 2 received the money from the debtors and the present suits brought in 1911 would therefore be barred. In *Mohabharat Shaha* v. *Abdul Hamidkhan* 1 Mookerjee, J. says at page 76 "if we are called upon in any concrete case to decide the question" (namely, whether the provisions of the Limitation Act do or do not apply to suits for partition, administration, construction of wills, public charities and apportionments of rent) "we might possibly hold that such suits are *not* beyond the scope of the Limitation Act, but that in each case the right to sue *accrues every moment during the whole of the time, that the right to the property continues to exist*; for instance, the liability to be partitioned is one of the incidents of joint property and a co-owner has the right to sue for partition at every moment of the whole period during which he continues to be co-owner. Indeed, it has been held in more than one case to be found in the books that Article 120 and S. 23 may have to be simultaneously applied to determine whether or not a suit is barred by limitation." These observations are, no doubt, *obiter*; for, the question which had to be decided in that case was whether a *declaratory* suit brought more than 6 years after the denial of the legal character sought to be declared by the suit was barred or not; and it was held that where the suit is based on a wrong or injury which is in the nature of a completed act, that is, where the wrong is not a continuing one in the eye of the law, limitation begins to run from the date of the wrong and the question whether *the right to sue* is a continuing one is irrelevant. However, it is clear from that case that the learned judges did make a distinction between suits for partition, administration and the like suits *which do not necessarily arise out of any wrongful act on the part of the defendant* and other suits *which are necessarily based upon such a wrong.* In the former class of suits, the right to sue accrues day by day so long as the right to the suit property exists. In the recent case reported in *Marian Beeviammall* v. *Kadir Meera Sahib Taragan* 2, decided by Sankaran Nair and Oldfield, JJ. the following remarks occur: "The defendants having taken up

1. (1905) 1 C. L. J. 73. 2 (1915) 29 I. C. 275.

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possession of the property *as tenants-in-common* they must be deemed to have been in possession of such property on behalf of themselves and of the plaintiff and it lies on them to say that so far as the plaintiff is concerned the character of their possession was changed 6 years before the date of the suit." That was a similar case to the case before us and the learned Judges held that the plaintiff's claim was not barred though the movables, (namely cash and sovereigns of the value of more than Rs. 25,000), in which she (the plaintiff) claimed a share had come into the defendants' (co-heirs') hands more than 20 years before suit."

This question of limitation is not, however, at all free from difficulty. The Allahabad High Court in the case reported in *Abdul Ghaffur* v. *Nur Jahan* [1], has taken the view that Article 62 applied to a similar case. (See also *Amina Bibi* v. *Nagin-un-nissa Bibi* [2]. But I think I am bound by the decision in *Khadirsa Hajee Bappu* v. *Puthen Veettil Ayissa Ummah* [3] and *Marian Beviammal* v. *Kadir Meera Sahib Taragan* [4]. I would therefore hold that the claims of the plaintiffs for their shares in the Rs. 1,000 are not barred by limitation. The result is that these two second appeals 2275 and 2277 should also be dismissed with costs.

Coming to the memoranda of objections, we must accept the finding by the Lower Courts that the houses on the sites in Schedule 1 were built with the self-acquired funds of defendants 1 and 2 and that the plaintiffs acquiesced in the erection of the building found on that site.

The objections are, however, maintainable in so far as they attack the vague reference in the District Munsif's decrees to the Partition Act. The decree in each suit says that "as regards house site in Schedule 1, steps be taken under the Partition Act 4 of 1893 in execution." What precise steps were intended to be taken or directed to be taken is not clear. In the Munsif's judgment, the following vague words occur: "Under these circumstances and especially as the defendants 1 and 2 own more than a half share in the items" (that is, the house site in Schedule 1) "and it is inconvenient to divide the sites after removing the buildings. I decide to take action under the Partition Act as requested by the learned vakil for the defendants 1 and 2." The Partition Act contains only 10 sections. The provisions of the

1. (1915) 13 A. L. J. 686.
2. (1915) I. L. R. 37 A. 233.
3. (1910) I. L. R. 34 M. 511 s.c. 20 M.L.J. 288 F.B.
4. (1915) 29 I. C. 275.

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Act empower a Court to direct a sale of properties sought to be divided if a division of the property itself by metes and bounds cannot reasonably or conveniently be made. It seems to me that in this case, a sale of the sites alone without the house would lead only to further litigation between the purchaser at such a sale and the defendants 1 and 2 and that it is not the most convenient way of effecting a partition. But the Civil Procedure Code in O. 26, R. 14, Clause 1 empowers the Court to authorise the Commissioner who is appointed before a final decree for partition is passed, to award sums to be paid to one or more of the sharers for the purpose of equalising the value of the shares. O. 20, R. 18, Clause 2 further empowers the Court in its preliminary decree to give such further directions as may be required to effect the most equitable partition. I would therefore modify the decrees of the Lower Courts in suit 259 of 1911 by omitting the clause "that as regards the house sites in Schedule 1 steps be taken under the Partition Act 4 of 1893 in execution and" and by substituting for the clause, "and the plaintiffs do recover 14/48th share of the value of the house sites abovesaid" the following namely, "that the Commissioner to be appointed before the final decree is passed be authorised to award 14/48th share of the value of the house sites in Schedule 1 to the plaintiffs for the purpose of equalising the value of the shares, allowing the defendants 1 and 2 to take the sites themselves exclusively." A similar modification with the necessary variation as to the fractional share will be made in the decree in the other suit. There will be no order as to costs in the memoranda of objections.

Napier, J.

Napier, J.:—I agree. I think that we must give a broad construction to the words "right to sue accrues" in an "omnibus" article like 120. The specific articles contain various different starting points of limitation and doubtless if the Legislature had succeeded in providing for every class of suit, words more suited to each suit would have been used and not this general language. In this case we are entitled to treat this right as a continuing right to sue from day to-day. Any other construction would work the greatest injustice.

PRIVY COUNCIL.

Present:—Viscount Haldane, Lord Parmoor, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.

On Appeal from the High Court of Judicature at Fort William, Bengal.

Bhupendra Krishna Ghose and another ... *Appellants* *

v.

Amarendra Nath Dey and another ... *Respondents.*

P. C.

Bhupendra Krishna Ghose *v.* Amarendra Nath Dey.

Hindu Law—Dayabhaga School—Will—Indian Succession Act of 1865, *S.* 111 *—Testator's power—Widow's estate—Adoption—Construction.*

Where a Hindu by his will empowered his widow to adopt five sons one after the other in case of their demise and in the event of her dying without adopting or the adopted son predeceasing her without leaving any male issue, directed the estate after her death to pass to the sons of his sister and the widow dying after the adopted son who died without leaving male issue, the adoptive mother of the testator claimed the estate as against the nephews:

Held, that the gift in favour of the nephews took effect and was not affected by S. 111 of the Succession Act inasmuch as the event on the occurrence of which the distribution was to take place was the death of the widow.

Under the Dayabhaga Law a testator could lay down that his widow should in spite of an adoption to be made by her, remain in possession during her lifetime.

S. 111 of the Succession Act should be applied only to cases strictly coming within its scope.

Appeal from a judgment and Decree of the High Court dated November, 28, 1913 confirming a Judgment and Decree of the same Court (Original Side) dated June 19, 1912.

One Herumbo Nath Ghose died on November, 10, 1907. By his will he empowered his widow to adopt a son and in case of his dying without male issue to adopt four more one after the other in the same contingency. In the event of her dying without adopting or the adopted son dying before her without leaving a male issue, his estate was to pass on to the sons of his sister. The widow adopted a boy who died without leaving a male issue and then she died without adopting any other son. The adoptive mother of the testator and then the next reversioner of the adopted son claimed the estate alleging that by the act of adoption the estate vested in the adopted son and so they were entitled to the estate as against the nephews alleging that the bequest in their favour failed under S. 111 of the Indian Succession

* 15th November 1915.

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Act of 1865. Both branches of the High Court having decided in favour of the validity of the bequest to the nephews, the claimants then appealed to His Majesty in Council.

Sir Robert Finlay, K. C., Upjohn, K. C., Sir W. Garth and Dunne for the Appellants.

The widow adopted a son who died before her without leaving a son. The question is whether on the death of the widow the nephews of the testator could succeed.

The whole question is whether the Hindu Law admitted of executory devise without an estate before. The Hindu Law of devise was based upon gift. One could not make a will *in futuro,* not even by way of executory devise. He could not make the property go over. By S. 111 of the Indian Succession Act, which was not originally intended to apply to the Hindus, but was made so by the Hindu Wills Act 1870, he could not make such a devise. The estate was in the widow and afterwards in the adopted son who took as an heir and not under the will. The will gave power to the widow to adopt. The adopted son took as an heir and not as a devisee. The testator could not cut down the estate of the heir by gift *in futuro. Tagore case,* I. A. Sup. Vol. p. 47, at 66-70.

There must be gift *in presenti* for the validity of a gift in future. The testator could not create a gift to take effect ten years hence. The son took by succession and the rest by devise.

Even if you implied a gift *in presenti* the bequest was bad under S. 111 of the Indian Succession Act. If the gift was of a life estate to widow and on her adopting to the adopted son, the period for distribution was the death of the testator or at any rate the death of the adopted son. Whether the widow could adopt another son depended on certain events. In *Amulya Charan Seal* v. *Kali Das Sen* [1] it was held that if the adopted son died leaving son or a widow, the testator's widow could not adopt. S. 111 was intended to provide that no executory bequest was to be good when one title which, but for the executory bequest would be absolute had vested. Distribution was not to be delayed further to see whether a specified event would happen.

1. (1905) I. L. R. 32 C. 861 (P.C.)

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Reference was made to *Norendranath Sircar* v. *Kamalabhasini* [1], *Soorjeemoney Dasi* v. *Deenobundo Mullick* [2], *Bhoobun Moyee* v. *Ram Kishore* [3], *Ghose* v. *Mitter* [4], *Bai Motivahoo* v. *Bai Mamoobai* [5], *Gordhandas Soonderdas* v. *Bai Ramcoover* [6], *Manikyamala Bose* v. *Nanda Kumar Bose* [7], Mayne's Hindu Law para. 624.

De Gruyther, K. C: (with him *Dube*) for respondents contended that S. 111 was intended to be a statutory rule of construction of a will; it did not in any way further or cut down the right of the testator. It was said that this Board had taken a contrary view in *Radha Prasad Mullick* v. *Ranee Mani Dasee* [8]. The words of the will were exactly the words of clause (*b*) of S. 111. S. 111 was considered by this Board in *Chunilal Parvatishankar* v. *Bai Samrath* [9]. The statute was based upon *Edwards* v. *Edwards* [10], which laid down a certain rule of construction. It is said that it would be against Hindu doctrine that an estate could remain in abeyance and that there must be a gift to take effect at once to support a gift *in futuro*.

Mr. Ameer Ali.—That is not strict Hindu Law but has grown up under our system.

Lord Haldane.—The Judges have introduced English Law into the Hindu system.

If they could not find a specific rule they could apply justice, equity and good conscience and that had been held to be the English Law in so far as it is applicable. Delivery of possession was only meant to complete a gift as a formality *Kali Das Mullick* v. *Kanhyalal* [11]. Execution of a deed was sufficient to pass property in a gift without delivery. All that 10 M. I. A. said was that it was not necessary to provide for a son by will.

Sir R. Finlay in reply.

The Judgment of their Lordships was delivered by

Mr. Ameer Ali.—This is an appeal from a judgment and decree of the High Court of Calcutta pronounced in a suit which relates to the will of one Herumbo Nath Ghose, a Hindu inhabi-

1. (1896) L. R. 23 I. A. 18.
2. (1862) 9 M. I. A. 123, 135.
3. (1865) 10 M. I. A. 279, 308-9.
4. (1877) I. L. R. 2 C. 295.
5. (1897) L. R. 24 I. A. 93, 104-5=I. L. R. 21 B. 709.
6. (1901) I. L. R. 26 B 449, 467.
7. (1906) I.L.R. 33 C. 1306, 1312-14.
8. (1908) L. R. 35 I. A. 118, 126, 127.
9. (1914) I. L. R. 38 B. 399. (P. C.)
10. (1852) 15 Beav. 361.
11. (1889) L. R. 11 I. A. 218.

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tant of the town of Calcutta, subject to the Dayabhaga School who died on the 10th of November 1907.

The material portion of the will, which bears date the 26th June 1898, is in the following terms:—

"This is the last Will and Testament of me Herumbo Nath Ghose of No. 45 "Pathuriaghata Street Calcutta, son of Girindra Chunder Ghose, deceased zemin- "dar. I revoke all prior testamentary writings and appoint my wife Srimati Pori- "toshini Dassi to be the sole executrix of this my will, I hereby authorize my said "wife to adopt Dattaka putra. In case of death of an adopted son my said wife "shall adopt one after another five sons in succession. If my said wife dies with- "out adopting a son or if such adopted son predeceases her without leaving any "male issue, in such case, my estate after the death of my said wife shall pass to "the sons of my sister Srimati Benodini Dassi who may be living at the time of "my death."

On the testator's death his widow Poritoshini Dassi applied for and obtained probate of the will. The estate of Herumbo accordingly vested in her as his legal representative and remained in her possession until her death three years later. It is alleged that in August 1909 she, in pursuance of the authority given to her by her deceased husband, adopted an infant of the name of Hem Chunder Dey. This child died on the 11th of March 1910 which was followed by the death of Poritoshini herself shortly after.

The present suit was instituted on the 30th of March 1910 by Kissory Moni Dassi, the adoptive mother of Herumbo, against the two sons of Benodini Dassi, his sister, for a declaration that in the events that had happened the devise to them had failed, and that the testator's estate had devolved on her. Kissory Moni died in September following, whereupon one Trailokya Nath Ghose, who alleged himself to be the next reversioner of the infant Hem, was substituted in her place. Tarilokya has died since the trial; and the present appellants are his son and widow who represent him as his executor and executrix respectively. The fact of the adoption by Poritishini of the infant Hem was denied by the respondents, but the question has not been tried. Both the courts in India have dealt with the case on the assumption has not been tried. Both the courts in India have dealt with the case on the assumption that the adoption was duly made as alleged by the plaintiff; and on the construction of the will have held that as the adopted son died without leaving male issue, on the death of the widow the bequest to the sons of Benodini took effect and they accordingly dismissed the suit.

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The judgment of the High Court is challenged on two grounds; *firstly*, it is urged that on the adoption of the infant, the estate vested in him as full owner by virtue of the Hindu law of inheritance, that he took it in his capacity of son and not as devisee under the will, and on his death the property devolved on his heirs. Consequently, it is contended the excutory devise in favour of the respondents failed completely. *Secondly*, it is contended that it fails also under the provisions of S. 111 of the Indian Succession Act (X. of 1865) which has been made applicable to Hindu by the Hindu Wills Act (of 1870).

It is to be observed that the will in this case does not infringe the rules which lay down the limitations on the testamentary powers of a Hindu. The bequest is to persons who were in existence at the time of the testator's death, and he does not create any estate unknown to Hindu law. Before proceeding to examine the will in order to discover the intentions of the testator, their Lordships desire to make one further observation, *viz.*, that under the *Dayabhaga*, the testator has not only the power of authorizing his widow to adopt a son to him, and in case of the death of such adopted son, to make other adoptions in order to ensure the performance of those religious rites on which depend his salvation in after life, but he can attach to such authority a direction that her estate should not be interfered with or divested during her life, just as he can postpone the succession of his natural-born son by interposing a life estate.

In the present case had the testator given to the widow a power to adopt without constituting her his executrix she would have taken merely a widow's interest which would have become divested on her adopting a son. It is clear, however, from the language of the will that the testator was anxious that there being no natural born son, a son should be adopted who and whose male issue should duly perform those religious rites which are considered essential in the Hindu system for the salvation of the deceased. With this object he empowered her to make five successive adoptions and constituted her his executrix to give effect to his wishes. If the first son so adopted died in her lifetime without leaving male issue, she had the power to adopt a second; or a third, fourth, or fifth in case the second, third, or fourth also died without leaving male issue. Thus the power to adopt confided to the widow could not be exhausted so long as she was alive until

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the directions of the testator had been fully carried out. It is obvious that the estate could pass only to the son who survived her, or, in case of his death in her lifetime, to his male issue, if he left any. Otherwise the whole object with which the power was given to the widow for making the adoptions would be defeated. The estate was in the widow during her life; the gift over is expressly declared to take effect after her decease in case of the failure of the adoptions without securing the object the testator had in view. Their Lordships conceive that a mere statement of the purpose of the testator which is apparent on the face of the will and of the consequences resulting from the contention advanced on behalf of the appellants is sufficient to show its fallacy.

The infant who was adopted by the widow died in her lifetime unmarried and without leaving any issue, and as she died a few days latter she was unable to give further effect to the wishes of her deceased husband. On her death, therefore, the gift to the sons of Benodini, the testator's sister named in the will, took effect, and the estate passed to them. But it has been strenuously contended that under the provisions of S. 111 of the Indian Succession Act the bequest to them is void. That section runs as follows:—

"Where a legacy is given if a specified uncertain event shall happen, and no "time is mentioned in the will for the occurrence of that event, the legacy cannot "take effect unless such event happens before the period when the fund bequeathed "is payable or distributable."

Section 111 embodies the rule enunciated in *Edwards* v. *Edwards* [1]. The rule of construction laid down in that case has been considerably modified by later English decisions. The Indian Act, however, has given it statutory force. Even in India as regards Hindus, its application is confined to special tracts such as the territories subject to the Lieutenant Governor of Bengal and the Presidency towns of Bombay and Madras. Their Lordships think that it should be applied only to cases strictly coming within its scope. In the present case the event on the occurrence of which the distribution was to take place is distinctly mentioned as being the death of the widow. That being so the gift to the nephews is not affected by Section 111 and must take effect.

Their Lordships are of opinion that the judgments of the courts in India are correct and that this appeal should be dismiss-

1. (1852) 15 Beav. p. 361.

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ed with the costs, and they will humbly advise His Majesty accordingly.

Solicitor for appellants :—*G. C. Farr.*

Solicitor for respondents :—*Watkins & Hunter.*

PRIVY COUNCIL.

Present :—Viscount Haldane, Lord Parmoor, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the High Court at Calcutta.]

Musabur Sahu and another ... *Appellants* *

v.

Lala Hakim Lal and another ... *Respondents.*

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Musabur Sahu v. Lala Hakim Lal.

Fraudulent conveyance—Transfer of Property Act of 1882, *S.* 53—*To defeat or delay creditor—Preference of one creditor over another—Consideration—Debt—Benefit to debtor.*

Where no consideration of the law of bankruptcy applies there is nothing to prevent a debtor paying one creditor in full and leaving the others unpaid although the result may be that the rest of his assets is insufficient to pay his remaining debts.

Re Moroney 1 followed.

Where a transfer is made, for adequate consideration, in satisfaction of genuine debts, and without reservation of any benefit to the debtor it could not be impeached under S. 53 of the Transfer Property Act.

Appeal from a Judgment and decree of the High Court dated April 3, 1907 revising a judgment and decree of the Court of the Subordinate Judge of Mozafferpore dated July 30, 1904.

The material facts of the case an sufficiently set forth in Their Lordships' Judgment. The Judgment of the High Court is reported in I. L. R. 34 Cal. at p. 999.

There were two different suits instituted in the Lower Court, but at the instance of the plaintiff appellants were set down for hearing together. Then they themselves raised objection to that mode of trial. The Judge however gave only one Judgment. The appellants at the Privy Council endeavoured to make use of evidence given in one suit in the other.

Dube for the appellants contended that on December 14, 1900 the appellants instituted a suit against one Kishan Benode Upadhya for the recovery of Rs. 12,695. The appellants become aware of the intention of Kishun Benode to dispose of his properties in order to defeat or delay the execution of the decree to be passed. An application was accordingly made under S. 483 of Code of Civil

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* 22nd November 1915.

1. (1888) L. R. 21 Ir. 27.

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Procedure of 1882 to call upon the said Kishun Benode to furnish security to satisfy the decree that might be passed against him. The application, was rejected on the said Kishun Benode filing an affidavit to the effect that he did not hear such an intention during the tendency of the proceedings in the suit the respondents were busy conspiring with the said Kishun Benode as to devising a scheme in order to delay or defeat the execution of the decree to be passed. The fraudulent scheme adopted was the execution of two documents by the said Kishun Benode on S. 2, 1901, whereby he conveyed practically all his immovable properties to the respondents and their near relations. The first was a mortgage bond executed in the name of Kanta Prosad who was the nephew and a ward of the respondent Paru Aotar Lal, while the second was executed in favour of the respondent Hakim Lal. The transaction was not *bona fide* and therefore paying a valuable consideration would not take the case out of the provision of S. 53 of Transfer of Property Act the transaction was to defeat the creditors and must fall. Nothing could be done to favour one creditor as against other creditors.

Reference was made to *Cadogan* v. *Kennett* [1] *Middleton* v. *Pollock* [2] and *Narayana Pattar* v. *Viraragkavan Pattar* [3].

Dunne appeared for the respondents but was not called upon.

The Judgment of their Lordships was delivered by

Lord Wrenbury:—On the 2nd September 1901 Kishun Benode executed two *kobalas* or conveyances the one to Kamta Prashad and the other to Hakim Lal. They were conveyances of certain lands, the parcels in the second deed being much more numerous than those in the first deed. Kamta Prashad was the nephew of Ram Aotar Lal, a brother of Hakim Lal. He was a minor and Ram Aotar Lal was his guardian.

The plaintiff, Musahar Sahu, was at this date a creditor of Kishun Benode. He had on the 14th Dec mber 1900 sued for the debt and on the 5th January 1901 had presented a petition for security by way of attachment before judgment. On the 11th February 1901, Kishun Benode had made an affidavit that he did not intend to transfer any of his properties, and accordingly on the 11th February 1901 the petition was dismissed.

In this state of facts the two *kobalas* were executed by the debtor on the 2nd September 1901.

1. (1776) 2 Cowper. 432. 2. (1876) 2 Ch. D. 108.
3. (1899) I. L. R. 23 Mad. 134.

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On the 5th December 1901 the plaintiff obtained judgment in his action for Rs. 12,695-10 and costs. The defendant did not appear at the trial. On the 21st December 1901, Kishun Benode applied for a re-hearing, but on the 2nd August 1902 that application was dismissed by default. In the interval, *viz.*, on the 11th June 1902, the transferees had obtained an order for registration of their names in respect of the properties transferred.

Under these circumstances two suits were brought to set aside the *kobalas* on the ground that within S. 53 of the Transfer of Property Act IV of 1882, the transfers were made with intent to defeat or delay the creditors of Kishun Benode.

The Subordinate Judge set aside the first *kobala* on the ground that no consideration was paid, that a debt of Rs. 6,335 therein alleged to be due to Kamta Prashad was fictitious, that the transfer was made gratuitously, and that the transfer was made with intent to defraud. An appeal was dismissed with costs, and this decision is not questioned before this Board.

As regards the second *kobala*, there are concurrent findings that the consideration for this deed was real and not fictitious. The Subordinate Judge nevertheless decided in favour of the plaintiff. Upon appeal this decision was reversed, and the second *kobala* upheld. From that decision the plaintiff has brought this appeal.

The appellant has not argued that the law is wrongly laid down in the judgment of the High Court. His contention is that the two deeds of the 2nd September 1901 form really one transaction, and that the second *kobala* must fall with the first.

As matter of law their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts. The law is, in their Lordships' opinion rightly stated by Palles, C. B., in *Re Moroney* [1] where he says:—

"The right of the creditors taken as a whole is that all the property of the "debtor should be applied in payment of demands of them or some of them, with- "out any portion of it being parted with or without consideration or reserved or re- "tained by the debtor to their prejudice. It follows from this, that security given "by a debtor to one creditor upon a portion of or upon all his property. Although the "effect of it or even the interest of the debtor in making it, may be to defeat an

1. (1888) L. R., 21 Irish 27.

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"expected execution of another creditor, is not a fraud within the Statute, because "notwithstanding such an act, the entire property remains available for the "creditors or some or one of them, and as the Statute gives no right to rateable "distribution, the right of the creditors by such act is not invaded or affected."

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid *Middleton* v. *Pollock* [1]. So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to this preferred creditor—there being in the case no question of bankruptcy.

The argument presented to their Lordships has in substance been that the transaction of the 2nd September 1901 was one transaction: that (1) Kamta Prashad, the nephew, the minor and ward, and (2) Hakim Lal, the uncle of Kamta and brother of Ram Aotar Lal, the minor's guardian, are for this purpose not distinguishable as independent transferees, that from the 11th February 1901 until after the 11th June 1902 Kishun Benode was playing for time, and that this fact and the fact that the former *kobala* was fictitious and fraudulent show that the latter *kobala* was fraudulent also. Their Lordships do not accept this contention. The *kobala* in favour of Hakim Lal must stand or fall on its own merits. The concurrent findings that the consideration for the deed was real reduces the case to one in which the debtor has preferred one creditor to the detriment of another, but this in itself is no ground for impeaching it under the section even if the debtor was intending to defeat an anticipated execution by the plaintiff.

Their Lordships will humbly advise His Majesty that the Appeal should stand dismissed with costs.

Solicitor's for appellants :—*T. L. Wilson and Co.*,

Solicitors for respondents :—*Watkins and Hunter.*

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1. (1876) 2 Ch. Div. 104, 10 ,.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
APPELLATE JURISDICTION.

Present :—Sir John Wallis Chief Justice and Mr. Justice Seshagiri Aiyar.

V. V. Srinivasa Aiyangar, High Court Vakil, *Appellant* *
Receiver to the Estate of A. Muniswamy
Chetty, deceased.

v.

V. Kannappa Chetti and others ... *Respondents.*

Srinivasa Aiyangar *v.* Kannappa Chetty.

Letters Patent (Madras) Cl. 12—Suit for land or other immovable property—Damages for cutting trees on lands outside Madras—Practice—Orginal Side—Costs—Fees paid to advocate appearing with Vakil—Cannot be allowed against opposite party.

A suit for damages for cutting and carrying away trees on land outside the local limits of the ordinary civil Jurisdiction of the High Court "is a suit for land or other immovable property" within the meaning of Clause 12 of the Letters Patent.

On the Original Side a party who is represented by a counsel instructed by a Vakil has no right to recover from the opposite party as part of the costs of the suit, the fees paid to the counsel.

On appeal from the judgment and decree of the Honourable Mr. Justice Sankaran Nair in the Ordinary Original Civil jurisdiction of this Court in C. S. No. 448 of 1912.

C. P. Ramaswami Iyer for Appellants.

M. A. Thirunarayana Chari, V. Parthasarathi Aiyangar and *C. Pattabhirama Aiyangar* for Respondents.

The Court delivered the following

Judgments :—*The Chief Justice.*—The first question in this appeal is whether a suit for damages for cutting and carrying away trees is a suit for land or other immovable property within the meaning of Clause 12 of the Letters Patent as held by Sankaran Nair J, as, if so, the suit was properly dismissed as the land on which the trees were growing was situated outside the jurisdiction. I do not think the question whether a decision involving the question of title in such a suit would be *res judicata* in a subsequent suit for the land is very relevant to an inquiry what is included in the words "suit for land or other immovable property," and assuming that a suit for cutting and carrying away trees does not come within these words, a decision in such a suit on a question

* O. S. A. No. 51 of 1914. 7th December 1915.

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of title by a Court other than the Court within the limits of whose jurisdiction the land is situated would not in my opinion under S. 11 of the Code of Civil Procedure be *res judicata* in a subsequent suit in the proper Courts for the recovery of the land itself as the first Court was not competent to try the subsequent suit. I cannot therefore agree with the learned Judge that the test of *res judicata* applies to a case like this.

English law had its writs of right, writs of entry, and assize of novel disseisin and the action of ejectment which superseded them, but knew of nothing so simple as "a suit for land or other immovable property" and English decisions therefore threw little light on this expression, which so far as appears, is first found in the Civil Procedure Code of 1859 drafted under the advice of Sir Barnes Peacock, and was reproduced in the Letters Patent of the three High Courts with original jurisdiction. These words have been explained or expanded in the subsequent Codes, and S. 16 (*e*) of the present code expressly includes suits for compensation for wrong to immovable property among suits triable only where the immovable property is situated. Alterations in the Code subsequent to the Letters Patent are of course of no assistance except in so far as they can be regarded as merely declaratory of what was already included in these words when first enacted in the code of 1859.

In *Manappa Mudali* v. *S. T. McCarthy* [1], it was *held* that suit for trespass to land were cognisable by the court of small causes under the Act then in force which gave jurisdiction in suits for damages up to Rs 500, and it was pointed out that the Act contained no such restriction as occurred in the Country Courts Act 9 and 10 Vict. C. 95, S. 58 restricting them from taking cognisance of any suit, in which the title to any corporeal or incorporeal hereditaments etc., shall be in question."

In *Nalum Lakshmikantham* v. *Krishnaswamy Mudaliar* [2], Moore, J. following the Calcutta decisions *held* that a suit for sale on a mortgage was a suit for land, and expressed the opinion *obiter* that S. 16 of the Code as it now stands is only an amplification with details of the words in the code of 1859 and the Letters Patent.

In *Maturi Subbayya* v. *Kota Krishnayya* [3], the court distinguished the decision in *John Young* v. *Manglapally Ramaya* [4],

1. (1881) I. L. R. 3 M. 192.
2. (1903) I. L. R. 27 M. 158.
3. (1904) I. L. R. 28 M. 227.
4. (1866) 3 M. H. C. R. 125.

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on the ground that the latter case was decided under the code of 1859 and not under the present code, but, the question is not discussed. In *Raghoji* v. *Bonaji* [1], a suit for a declaration of title to land outside the jurisdiction of the Bombay High Court and for an injunction Jenkins, C. J. observed that the words suit for land must be wider than ejectment; and after referring to *British South Africa Company* v. *Companhia De Mocambique* [2] where it was held that a suit for trespass to foreign land would not lie in England where the title was in question went on to say that this should make us pause before we put on the words "suits for land" a construction that might require us to decide the title to land abroad. The later decision of Davar, J in *Zulekabai* v. *Ebrahim Haji Vyedina* [3] where all the authorities are examined is also in favour of putting a wide construction on these words in the Letters Patent. Lastly, we have the very recent decision of Jenkins C. J. and Woodroffe J. in *Sudantri Coal Company Limited* v. *Empire Coal Company Limited* [4] on appeal from the decision of Fletcher, J following his own decision in *Lodna Colliery Co. Limited* v. *Bipin Behari Bose* [5]. The learned Chief Justice comes to the conclusion that a suit for trespass to land is a suit for land where the substantial question is the right to the land. This decision is in accordance with the view expressed by Moore, J. in *Nalum Lakshmi Kantham* v. *Krishnasawmy Mudaliar* [6] and with the recent trend of decisions in the Bombay High Court and gives the Letters Patent a meaning which is in accordance with the general principles of jurisdiction and with convenience, and I am prepared to follow it.

The next question, which is one of importance to all classes of the legal profession, relates to the claim of the defendant to recover from the plaintiff as part of the costs of the suit the fee paid to the counsel who appeared with the vakil in the case, a claim which the learned Judge allowed. As is well known the Original Side of of the Chartered High Courts has succeeded to the jurisdiction of the three Supreme Courts in which the right of practice was confined to attorneys and barristers or advocates according to the provisions of the Supreme Court Charter.

On the 1st of October 1863 after the passing of the Indian High Courts Act 1861 aad the Charter of 1862 the High Court framed

1. (1904) I. L. R. 29 B. 249.
2. (1893) L. R. A. C. 602.
3. (1912) I. L. R. 37 B 494.
4. (1915) I. L. R. 42 C 942.
5. (1912) I. L. R 39 C 739.
6. (1903) I. L. R. 27 M, 157.

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rules admitting vakils to practice on the Original side of the Court under the provisions of S. 8 of the Charter which empowered them to admit vakils to appear and act for the suitors of the High Court subject to the rules and directions of the said High Court. The corresponding clause 9 of the Charter of 1865 is much more specific and expressly provides that "such advocates, vakils and attorneys shall be and are hereby authorised to appear for the suitors of the said High Court, and to plead or to act, or to plead and act for the said suitors according as the said High Court may, by its rules and directions, determine and subject to such rules and directions". In 1875 in "*In the matter of the petition of the Attorneys* [1], it was contended that clause 9 was *ultra vires* as not in accordance with the High Courts Act and that the rules made thereunder were consequently invalid but this contention was overruled and the validity of the rules upheld by the court.

On the 5th of July 1866 fresh rules had been issued by the High Court pursuant to the powers conferred by this clause. Rule 2 provided that the rules of the 1st October 1863 made under the Charter of 1862 as to the qualification and admission of advocates, attorneys and vakils should be read as part of these rules.

Rules 4 and 5 were as follows :—"Upon all applications and proceedings in chambers and upon the first hearing of original suits of every kind, advocates may appear and plead, and vakils admitted under the rules of the 1st October 1863, and attorneys may appear, plead and act for the suitors provided that the fee of the advocates shall not be allowed upon taxation as between party and party unless the judge shall certify that the case was a proper one for the attendance of an advocate."

"Except as in the last rule is provided, advocates may appear and plead. Vakils admitted under the rules of the 1st October 1863 may appear, plead and act, and attorneys may appear and act for the suitors in all matters over which the court has any jurisdiction."

The effect of these rules was to give advocates the right to appear and plead, attorneys the right to appear and act, and to plead in chambers and to give vakils the right to appear and plead and act in court and chambers subject to the provision in Rule 4 as to the fee of an advocate for appearance at the First hearing or in chambers not being allowed upon taxation as

1. (1875) I. L. R. 1 M 24.

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between party and party without a certificate of the court, leaving his fees otherwise to be recovered by the attorney upon taxation between party and party in the usual manner.

Now at this time and for some time forty years afterwards it was never suggested that an advocate could appear uninstructed by an attorney, and even assuming that the rule does not in terms preclude his so appearing, it is quite plain to my mind that it was never contemplated in these rules to give facilities for the recovery from the opposite side of fees paid to him unless these fees had been paid through the recognized agency of the attorney. The creation of a single agency by the admission of vakils to appear, plead and act on the Original Side, however necessary and expedient, was an invasion of the exclusive rights of practice previously enjoyed by the double agency of counsel and attorneys, and that is no reason to suppose that it was then or in any subsequent modification of the rules intended to go further and confer upon vakils the further right of acting as recognised agents for the purpose of briefing counsel and recovering from the other side the fees paid on the brief, or that it was intended to enable a party to brief counsel himself without the intervention of an attorney and recover the costs from the other side. The object of the rules was to establish the single agency of the vakil as an alternative to the double agency of the counsel and attorney and not to authorise the vakil to substitute himself for the attorney in the work of the double agency. When the rules of 1863 and 1866 were framed, it was thought desirable that a vakil should be allowed to appear along with counsel and attorney in a certain class of cases, and this was specially provided for by a rule which has since been repealed apparently because it was not acted upon, and at present an attorney and a vakil cannot both appear on the record at the same time. Rule 534 of the Original Side Rules. Without the exclusive right of briefing counsel and recovering his fees as part of the costs from the other side it may be doubted if attorneys could long exist as a separate order. It is well settled they could only be deprived of such an exclusive right under statutory authority. (*In the matter of the Sergeants-at-Law*, [1]) and in clear and unambiguous terms.

The present rule 533 on which Sankaran Nair, J. relies merely re-enacts in slightly altered form the provisions of Rules 4 and 5 of the Rules of 1866.

1. 3 St. Tr. N. S. 1294.

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Turning now to the fee rules, Order 5 relates exclusively to attorneys' fees and it is under that head that counsel's fees are dealt with. Rule 63 of Order VI of present rules as originally passed made Order V applicable to vakils' costs in certain cases but was repealed before it came into force. It expressly provided that vakils should not be entitled to any fee incidental to employing counsel thus showing that it was not intended to infringe the attorneys' exclusive rights in this matter. The present Rule 63 which was substituted for it continued the existing system, and provided that the fees allowed to vakils should be calculated according to the scale of fees prescribed for pleaders on the Appellate Side, being Rules 30 to 40 of the rules under the Legal Practitioners Act as from time to time amended.

Rule 40 (now re-numbered 41) provides that the fee allowed is intended to cover all proceedings up to decrees, and did not permit of a second vakil's fee being allowed even in heavy cases; and though this has since been amended, the amendment does not apply to suits instituted on the Original Side of the Court. It clearly did not contemplate the allowance of any fees for counsel in cases in which a vakil appears, or for any reduction of the vakil's fee when counsel appears with him.

As to the circumstances which have given rise to the present question the number of advocates, and more especially of Indian barristers, has increased of late years while, on the other hand, the larger number of cases on the Original Side of the Court are vakils' and not attorneys' cases. In 1908 an advocate claimed the right to be heard in a case in which he had not been instructed by an attorney, and following the decision of the Court of Queen's Bench in *Doe Dem Bennet* v. *Hale and Davis* [1] and having regard to the terms of Rule 533 I held that I could not refuse to hear him. Subsequently advocates have from time to time appeared in cases in which they were not instructed by attorney.

The present attempt to recover from the other side as part of the costs of the suit the fees paid to them is naturally opposed by the Attorneys' Association, and has also been opposed by Mr. Ramaswami Aiyar as prejudicial to the interests of the vakils. At present we are only concerned with the question whether under the existing rules such fees can be recovered from the other side. For the reasons already given I am of opinion that they

1. (1850) 15 Q. B. 171.

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cannot, and I abstain from expressing my opinion as to whether the existing rules affecting the different classes of practitioners on the Original Side are susceptible of improvement. The order allowing counsel's fees is reversed. Otherwise the appeal is dismissed.

Seshagiri Aiyar, J.

Seshagiri Aiyar J:—The suit is for damages by a receiver. He complains that the defendants unlawfully cut and carried away the casuarina trees belonging to the estate. The land on which the trees stood is outside the jurisdiction of the Original Side of the High Court, but the defendants live within its local limits. Mr. Justice Sankaran Nair held that the compensation claimed was covered by the term *land* in S. 12 of the Letters Patent and that consequently the High Court had no jurisdiction to try the suit. In dismissing the suit on this ground, the learned Judge awarded costs to the advocate who was instructed by a vakil.

The appeal is against the said decree. There are two questions (a) whether a claim for compensation for the value of the trees cut and carried away by the defendants is a claim for land; and (b) whether a party engaging an advocate through a vakil is entitled to the costs of counsel.

The second point was argued by Mr. Ramaswami Aiyar first. It is a question of great importance. I shall therefore deal with it at once. The learned Judge for whose opinions I entertain a high regard starts with the proposition that a party is "*prima facie* entitled to recover all the reasonable costs incurred by him." In his view, the right to be reimbursed is the inherent right of every litigant who comes to court. I am unable to find any authority for this position. The right to have costs from the losing side is given by the statute. Every man has the inherent or Common Law right to claim redress from a tribunal established by the Sovereign authority. He is entitled to plead his own cause before the judge; but the right to be represented by another in stating his claim is a privilege, This has been conferred on litigants by Sovereign authority. S. 10 of the Letters Patent and Order III of the Code of Civil Procedure deal with this question. In a very instructive essay by Mr. Nagabhushnam, a learned vakil of this Court, the history in this country of the concession to be represented by another in the conduct of a case is fully given. The British Government had traditions in this behalf reaching to ancient times. Consequently it was early enacted that parties were entitled

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to have the assistance of pleaders in placing their claims before the Court. I do not think there is any ground for holding that this right to representation is anything more than a statutory right conferred on litigants by the Sovereign power although it is a privilege hallowed by authority and is recognised as just and right by every civilised nation.

As regards the costs to be paid to the successful litigant, in my opinion, it is more in the nature of a penalty imposed on the losing party for having compelled the successful party to seek redress in a court of law, than it is in the nature of a right. The court does not award the winning party all the expenses incurred by him, but only such costs as in its opinion, are sufficient compensation for the trouble he has been put to. The disability to which the losing party is subjected is the result of statutory law ; and courts should exercise this power to mulct the judgment-debtor in costs within the limits imposed by the statute. If the rules made in this behalf contemplated remuneration to a particular class of practitioners only when they are instructed in a particular way, we are not justified in extending them by analogy to other cases. Mr. Justice Sankaran Nair concedes that the rules had not the case of an advocate instructed by a vakil in contemplation. There can be no doubt about the correctness of this statement. On this hypothesis, it seems to me that a penalising provision such as the one as to costs should not be extended by analogy to cases which were not intended to be provided for. After all what we have to see is not that an advocate, vakil or attorney gets his fees, but that the losing party is not made to pay more to the other side than what the law compels him to pay. S. 35 of the Code of Civil Procedure makes the award of costs to depend "upon prescribed conditions and limitations and on provisions of law in that behalf for the time being in force." Under this section, the court can deprive a successful litigant of his costs, but cannot make the losing party pay more than what the rules have prescribed.

I was curious to ascertain why the system of payment of pleader's fees by the *ad valorem* system was introduced into this country by a Government only familiar with the taxation of costs for work done. Once again, I must acknowledge my indebtedness to Mr. Nagabhushanam for the quotations from Sukranitisara which he has made in the essay which I have

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already referred to. Apparently, the system of paying a particular percentage was prevalent in this country. " The fee of a Niyogita shall be 1/16 of the value of the subject-matter or a twentieth thereof, or a half of the twentieth or a half of that half or a half of that. The fee shall thus vary inversely as there is increase in the value of the subject matter." Very likely, the British Government adopted these principles in fixing the fee of the practitioners. I am not sure whether under the ancient Hindu Polity, the remuneration paid by a litigant was recoverable from the adversary. I find that in the days of Chandra Gupta all that the judgment debtor can be compelled to pay was the cost incurred by the judgment creditor in summoning witnesses, (page 132, Narendra Nath Law's studies in ancient Hindu Polity, Vol. I.). The rate fixed in the Sukranitisara was apparently intended to regulate the scale of fees as between pleader and client.

Before I deal with the rules specifically, I wish to say a few words upon another matter. Mr. Tirunarayana Chariar contended that a vakil has in him the capacities of both a solicitor and an advocate and that in the former capacity he is competent to instruct an advocate. I do not read the qualifications of a vakil in that light. In the English courts, a solicitor was not competent to plead in court. In this country, the authorities apparently thought that the litigants will not always be able to pay for the double agency. It was for that reason that the vakil was enabled both to act and plead, the object aimed at being that the acting vakil must be the solicitor to his pleading self. The two functions were never intended to be divorced. The learned advocate suggested that when a vakil engages counsel with himself in appeals from the mofassil, he was briefing the advocate. I entirely demur to this contention. No vakil whether he works with a senior vakil or an advocate ever engages his pleader in the sense that he makes himself responsible for the latter's remuneration. It is the party that engages both. I am therefore of opinion that this argument is not open to the respondent.

The learned Judge relies on the language of R. 533 for the position that the taxing officer is competent to allow the fee of an advocate instructed by a vakil in the same way that he is empowered to allow Counsel's fee for attendance at Chambers. The rule is not happily worded, but a reference to the rule which it supersedes makes the meaning clear (old Rule 318). A party is

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not ordinarily entitled to recover from the other side fees paid to Counsel for attendance in Chambers, because that is work which can ordinarily be done by the solicitor; but in exceptional cases, the taxing officer on the certificate of the Judge to that effect can allow his fee. This rule furnishes no authority for the proposition that a Vakil-instructed-advocate can, on the certificate of a Judge, claim that his fees should be taxed. Another rule commented upon is Rule 191. As I stated already, we must find the right to costs within the four corners of the rule framed by the High Court. If under Rule 191, the vakil is not entitled to produce the allocation of the taxing officer, he is not entitled to ... on the fees of the advocate whom he has instructed.

The learned Judge relies on the judgment of the learned Chief Justice while sitting on the Original Side wherein it was held that an advocate is competent to plead without instruction from an attorney. This ruling was based on the dictum of Lord Campbell, C. J., in *Doe Dem Bennett* v. *Hale and Davis* [1]. The ruling in question only gives a right of audience to Counsel even though not instructed by a solicitor. It is no authority or the position that the costs of such a Counsel can be taxed as between party and party. The rules do not provide for taxation by the litigant of the costs if any paid to his advocate nor of the costs paid to his vakil. Mr. Tirunarayana Chariar relied on O. IV, R. 21. The right of the party to present a bill in person for taxation is subject to Rule 532. A party may appear in person and if he incurs any costs in taking out summonses, etc., he may get them taxed; but he ceases to have any *locus standi* to present a bill the moment he engages either a solicitor or a vakil. Then we shall have to refer to the rules by which their presentment of bills is concerned. While Order V allows an attorney to present bills including the fees paid by him to Counsel, Order VI which deals with vakils fees contains no such provision. R. 63 makes it clear that a vakil's remuneration is governed by the scale of fees prescribed in that behalf. R. 31 of the Fee Rules framed under S. 27 of Act XVIII of 1879 says that the consolidated *ad valorem* fee is the only remuneration which the losing party is bound to pay to the adversary's vakil. The fee under R. 31 extends up to decree (see Rr 40 & 41). Only one set of fees is allowable to the vakil is also clear. For sometime,

1. (1850) 15 Q. B. 171.

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there was a rule in force to the effect that the fees of the vakils engaged in conducting an Original Side suit may be allowed. That was soon abolished. In C. S. No. 45 of 1905, it was decided that only the fee of one vakil was allowable. On the Appellate Side there is a special rule for granting an extra remuneration to a second vakil in heavy cases. From these rules, the matter is placed beyond doubt that only one fee is allowable to a vakil and that he is not entitled to divest himself of his function as a pleader and to claim to act as solicitor because he chooses to engage an advocate. The position of the vakil on the Original Side has been the result of prudential considerations on the part of the authorities both from the point of view of the litigant public and of the pleaders themselves. The party is benefitted because he is not obliged to have recourse to the double agency of solicitor and counsel which in the majority of cases would be very costly. The vakils as a class enjoy the advantage of pleading without looking to instructions from others. If they want to give up this advantageous position, they should not aspire to plead, but should enrol themselves as solicitors. From a fairly intimate knowledge of the aspiration of the vakils, I can say that they consider that it would in no way conduce either to their prestige or to advance their cause that they, while still desiring to plead, should, on occasions claim to act as solicitors. Mr. Tirunarayana Chariar argued that the position of the vakils was analogous to that of the solicitors who were allowed to act and plead in County Courts. The simple answer to that is that vakils are allowed to plead in the higher courts in the same way as advocates and consequently the analogy suggested is not relevant. I am clearly of opinion that under the rules as they stand, the learned Judge had no power to grant the fee of an advocate who was instructed by a vakil.

On the question of jurisdiction, I am of opinion that the decision of the learned Judge is right. The Legislature in this country has thought fit to amplify the expression *land* to be found in the 1859 Code of Civil Procedure into the various clauses which we find in S. 16 of the present Code of Civil Procedure. Clause (*e*) of that section covers the present case. In relation to land, there are three classes of cases: (*a*) claims to recover possession; (*b*) claims to recover money by sale or otherwise of the property; this has been compendiously described as claims operat-

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ing on the land; and (c) claims personally enforceable for injuries done to immovable property. The first two classes of cases are now conceded to be covered by the expression *land*. The difficulty arises with reference to the third class. In ascertaining the quantum of damages, the right to immovable property will often be in question. It was said that a decision on the point would be *res judicata* in a subsequent litigation and that consequently the proper *forum* for adjudicating the claim as to damages should be the court which has direct jurisdiction over immovable property. There are two answers to this objection. The High Court on its Original Side is not competent to entertain suits to recover immovable property situated entirely outside its local limits. Consequently under Section 11 of the Code of Civil Procedure its adjudication will not operate as *res judicata*. In the second place, the Judge sitting on the Original Side will certainly not be less competent to decide the question as to title than the Judge sitting in a mofussil court; and parties will not be prejudiced by a pronouncement by a Judge of the High Court on a question of title. Therefore I do not feel pressed by the argument based on this ground. On the authorities, there is no decision directly bearing on the question in Madras. The point was not directly in issue in *Viraraghava* v. *Krishnasami* [1] and in *Maturi Subbayya* v. *Kota Krishnayya* [2]. On the other hand *Crisp* v. *Watson* [3] *Lodna Colliery Co. Ld.* v. *Bipin Behari Bose* [4] and *Sudamdhi Coal Co., Ld.,* v. *Empire Coal Co. Ld.* [5] are directly in point and favour the view taken by the learned Judge. The dictum of Moore, J in *Nalam Lakshmikantham* v. *Krishnasamy Mudaliar* [6] is also in favour of the respondent. *Zuleikabai* v. *Ebrahim Haji Vyedina* [7] regards a claim for title-deeds as a suit for land, whereas *Puttam Gowda* v. *Nilkanthe Kalodeshpande* [8] which resembles the present case holds the other way. I do not propose to examine the authorities any further. It is desirable to have a uniform rule of practice on a question of this kind. There can be no question that the balance of convenience, if that is any element in deciding this question, is in favour of declining jurisdiction. Although the defendant may be within the local limits, the witnesses to the

1. (1883) I. L. R. 6 M. 344.
2. (1904) I. L. R. 28 M. 227.
3. (1893) I. L. R. 20 C. 689.
4. (1912) I. L. R. 39 C. 739.
5. (1915) I. L. R. 42 C. 942.
6. (1903) I. L. R. 27 M. 157.
7. (1912) I. L. R. 37 B. 494, 14 Bom. L. R. 846.
8. (1913) I. L. R. 37 B. 675.

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trespass will not be ordinarily local residents; if a Commissioner is to be appointed to make a valuation after examining the property, it could better be done by a man on the spot. One other consideration may be mentioned. If the claim is for damages between Rs. 2,000 and Rs. 2,500, the City Civil Court which is governed by the Civil Procedure Code will not have jurisdiction, although if the claim exceeds that pecuniary limit, the High Court will have jurisdiction, if the decision is in favour of giving jurisdiction to the High Court. Such an anomaly should be avoided, if possible. For all these reasons, I agree with the learned Chief Justice in holding that the Original Side of the High Court has no jurisdiction in suits of this description.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice, Seshagiri Aiyar, and Phillips JJ.

Kamaravutu Mrutyunjayadu ... *Appellant* * (*Appellant in S.A. No. 662 of* 1913 *on the file of the High Court*) *1st defendant.*

v.

Raja Saheb Maharban Dostan Sri Raja Ravu Venkatakumara Mahipati Surya Rao Bahadur Sardar, Rajahmundry Sircar, Rajah of Pittapuram. *Respondent* (*Respondent in do. Plaintiff.*

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Grant—Construction—Resumability—Grant burdened with service—Grant in lieu of wages—Distinction—Tests—Grant of "Service Inam"—Services to be rendered only private. Reservation of Kattubadi to grantor. Rental that grantee was to be rendering service so as to deserve patronage of Divanum—Effect.

Where the point for decision was whether a grant was merely a grant in lieu of wages and therefore resumable at the will of the grantor or a grant of land burdened with service and therefore not resumable so long as the grantee and his heirs were ready and willing to render service and it appeared that (1) the grant was made to " Nakesh (decorator) Mrutyanjayudu, (2) the deed recited that the donee had rendered services in the past and that the said services were acceptable to the donor, (3) the lands were granted as Service Inam, (4) the grantee was, under the grant, to pay a fixed Kattubadi which was never enhanced during the 45 years during which the grantee and his heirs were in possession, (5) the grantee was, after the grant, to render services which would deserve the approbation of the divanum, (6) the grant was stated to be hereditary and the lands granted were held by the grantee and his heirs in the lineal line for 3 generations and (7) both prior and subsequent to the grant the grantees' services were recompensed by the same salary.

Held by *Seshagiri Aiyar and Phillips JJ.* (The Chief Justice dissenting) that the grant was a grant burdened with service and was not resumable so long as the grantee and his heirs were willing to render service.

* L. P. A. No. 356 of 1914. 14th December 1915.

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The Chief Justice—The balance of authority in this Presidency is in favour of the view that Service Inams granted for services of a personal nature are resumable

Per Seshagiri Aiyar, J.—The presumption in government grants that the lands granted as service Inam are resumable is inapplicable to grants by Zemindars.

No general rule can be laid down, apart from other circumstances, that a grant for personal or menial services is liable to resumption.

A clause in a grant by a Zemindar that the grantee should be rendering service "so as to deserve the patronage of the Divanum" does not show that the grantee was to hold the lands during the pleasure of the grantor. It is suggestive only of the vaingloriousness of the grantor.

Appeal under S. 15 of the Letters Patent against the judgment of Mr. Justice Sadasiva Aiyar dated the 1st October in S. A. No. 662 of 1913 preferred against the decree of the court of the Subordinate Judge of Cocanada in A. S. No. 113 of 1911 (O. S. No. 608 of 1909 on the file of the court of the District Munsif of Peddapur).

[The facts of the case are fully set forth in Mr. Justice Seshagiri Aiyar's Judgment.]

The material portion of the documents Ex. A & I, the muchilika and patta are as follows :—

Muchilika executed and filed on 15th March 1868 in favour of the Diwanam of M. R. Ry. Sri Raja Rao Venkata Mahipati Gangadhara Rama Rao Bahadur, Zamindar of Pittapuram, etc., by Nakesh Kamarantu Mrityunjayudu.

Because I was doing service properly so that I deserved the patronage of the diwanam you bestowed on me and granted as service Inam, fixing Kattubadi at Rs. 3 per annum, lands in Pittapuram village. * * * "So we shall be rendering service so as to deserve the patronage of the diwanam, shall be enjoying those lands as I like from fasli 1278, shall be paying Kattubadi every year according to the instalments in the village and shall be enjoying (the same) from my son to grandson and so on in succession. Such is the Muchilika executed and filled with consent."

"Patta executed and granted on 15th March 1868 in favour of Nakesh Kamarantu Mrityunjayudu by Zemindar of Pittapuram.

As you are rendering service properly so as to deserve the patronage of the diwanam you were favoured and lands Pittapuram village have been granted to you as service Inam fixing Kattubadi at Rs. 3 per annum. So you shall be rendering service so as to deserve the patronage of the diwanam, enjoy these lands as you please from fasli 1278, and enjoy (the same) in peace from your son to grandson and so on in succession paying the said Kattubadi every year according to the instalments in the village."

[The Second appeal came on before Ayling and Sadasiva Aiyar, JJ. who delivered the following differing Judgments.]

Ayling, J. :—The decision of this appeal turns entirely on the construction of Ex. A and Ex. I, the muchilika and patta evidencing

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the terms of the grant in 1868. The primary question is whether it was a grant burdened with a certain service, or a grant in lieu of wages: the distinction is drawn in the Privy Council cases *Forbes* v. *Mir Mahomed Tuquee* [1] *Lachamand Singh* v. *Manoranjan Singh* [2], and *Venkatanarasimha Appa Rao Bahadur* v. *Sobhanadri Appa Rao* [3]. The answer is not easy, but looking (1) to the reference to past service whereby the patronage of diwanum was deserved, (2) to the provision that the grantee was to enjoy from son to grandson and so on in succession, I am inclined to hold that this was a grant burdened with service. I do not think the mere description of the Inam as a service inam, or the condition that "you (the grantee) shall be rendering service so as to deserve the patronage of the diwanum" are sufficient to negative this conclusion. There is moreover a clause reserving to the Raja a small Kattubadi of Rs. 3 per annum a feature which, if I rightly understand the judgment of the Privy Council in 13 Moore's Indian Appeals 438 would if present in that case, have been held conclusive in favour of the grantee.

Where the grant is of this nature "so long as the holders of those grants are willing and able to perform the services, the Zemindar has no right to put an end to the tenure whether the services are required or not." (*Vide* Law Reports I. A. Supplemental volume 181 quoted in 29 M. 52 at page 57). I can find no authority for holding that the nature of the services makes any difference in the case of such a grant: though in the case of a service grant where lands are enjoyed in lieu of wages, the power of arbitrary resumption would largely turn on whether the services were private or public. The Subordinate Judge appears to me to have wrongly construed Exhibits A and I and to have misunderstood the law on the subject.

I would set aside the decree of the Subordinate Judge and dismiss the suit with costs throughout.

Sadasiva Iyer, J.:—The 1st defendant is the appellant, the plaintiff (respondent) being the Raja of Pittapur. The question is whether the Nowkari (service) Inam granted to the appellant's grandfather in 1868 by the plaintiff's father was granted in order that the income of the Inam lands might be treated as wages for the personal service of "Nakesh" or whether it was granted, not as wages for the said service, but as a grant subject to the condition of doing the "Nakesh" service. The learned Subordinate Judge on appeal held that the grant was of the former character. His reasons (as I understand them) are (1) the service performed by the grantee was private and personal to the grantor and not a public service or an obligation of a feudal character.

1. (1870) 13 M. I. A. 438.
2. (1874) L. R. Indian Appeals Suppl. Vol. 181.
3. (1908) I. L. R. 29 M. 52.

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(2) The office goes by a particular designation, namely, 'Nakesh' and that office was conferred on the grantee. (3) This is a *Darmilla* grant, that is, a grant subsequent to Permanent Settlement. In *Forbes* v. *Mir Mahomed Tuquee* [1] their Lordships say at page 464 that in "every case the right to resume must depend in a great measure upon the nature of the particular tenure or the terms of the particular grant." Their Lordships quote with approval in page 463 a decision of the Sudder Dewanny Adawlat of 1858 in which it was held that a tenure will be liable to resumption notwithstanding its hereditary nature and even if it is a grant subject to condition of service and not a grant in lieu of service, if the service be not performed.

A fortiori it seems to me that the hereditary nature of the grant is not against the resumability of the grant where it is a grant in lieu of wages for service. Their Lordships set out in their Judgment in that case that the service to be performed by the defendant was not attached to any particular office or known by any particular designation. They also point out that the grantee was not a private servant of the Zemindar. (See p. 461.) They further point out that if the public or government representing the public had an interest in the service, the grant is not resumable (See same page 461 and page 462.) Then at page 466 their Lordships say "*Had this been a grant reserving the Zemindar a small money-rent, as well as the services, if indeed the latter are reserved to the Zemindar* their Lordships would have had no doubt upon *the case*." It seems to me that this sentence, read in the light of the other passages in the judgment, means that if the services were reserved to the Zemindar, the fact that a small money-rent was reserved, (whether it is called kattubadi or quit rent or by any other name), their Lordships would have had no doubt that it was a resumable tenure.

The case in *Leelanund* v. *Manorunjun Singh* [2] related to lands held on ghatwali tenure,—ghatwali services were services performed for the protection of properties situated in a Zemindari from the attacks of the mountaineers and other turbulent people see *Raja Leelanund Singh Bahadur* v. *The Government of Bengal* [3], and the British Government dispensed with those public services. It was held that the Zemindar could not resume the lands held on such tenure. In *Radha Pershad Singh* v. *Buddu Dashad* [4], the learned Judges rely upon 13 M.I.A. 438 in support of the distinction between a grant for services of a public nature, and one of services, private or personal, to the grantor, and they state that in the former case the Zemindar is not entitled to resume, while in the latter case he may do so, when the services are not required or when the grantee refuses to perform the services (see page 941.) Even in the

1. (1870) 13 M. I. A. p. 438.
2. (1874) L. R. 1 I. A. (Suppl. Vol) 181.
3. (1855) 6 M. I. A at p. 102.
4. (1895) I. L. R. 22 C. 938.

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case of the grant of an estate burdened with a certain service (as distinguished from the grant of an office the performance of whose duties is remunerated by the enjoyment of certain lands), though the Zemindar is not ordinarily entitled to resume, he is so entitled if in the grant itself appropriate terms are introduced giving the grantor a right to resume the lands on the non-fulfilment of certain conditions (see 13 M. I. A. pages 464 and 465 and *Lakhamgavda* v. *Keshav Annaji* [1]. See also *Sanniyasi Raju* v. *Salur Zemindar* [2] and *Mahadevi* v. *Vikrama* [3] as to the *prima facie* right of the Zemindar to resume the grant made for personal services as distinguished from public services). In the case in *Vadisapu Appandora* v. *Vyrichurla Virabhadra Raja Bahadur* [4], White C. J. and Phillips, J. hold that the nature of a tenure has to be decided upon the evidence in each case and in the case of a grant subsequent to the Permanent Settlement to which services of a personal as opposed to public character are attached, the burden of proving that it is not resumable is on the grantee.

In *Gajapathi Maharajulu Garu* v. *Sondi Prahlada Binoji Ratno* [5] the opinion is expressed that a favourable quit rent being reserved as payable to the Zemindar was not of much importance on the question of the resumability of the grant (see also 7 M. 268 and 14 M. 365 on this point) these decisions evidently having followed the opinion of their Lordships of the Privy Council at page 466 of 13 M I A.

In *Venkata Narasimha Appa Rao Bahadur* v. *Sobhandri Appa Rao Bahadur* [6] their Lordships of the Privy Council quote with approval certain sentences from the Judgments of this Court which indicate a few of the grounds on which this High Court held that the grant in that case was not resumable. One of those grounds is that " no office by any particular designation was conferred by the original grantee, but an obligation of a feudal character was imposed upon him. Other grounds are the hereditary character of the grant and the invariable kattubadi received for a long series of years (about 120 years) without any attempt at resumption. As I said in the beginning the question whether the grant is resumable or not has to be decided on a consideration of all the circumstances appearing in the evidence including the nature of the service, the terms of the grant, the question whether the service is attached to any office known by any particular designation and so on. In the present case, the learned Subordinate Judge was, it seems to me, entitled to find on the terms of the grant, on the nature of the grant, on the date when it was made, on the nature of the service, on the designation given to the office and similar circumstances, that it was a grant made in lieu of wages for the per-

1. (1901) I. L. R. 28 Bom. 305.
2. (1883) I. L. R. 7 M. 268.
3. (1891) I. L. R. 14 M. 365.
4. (1911) 2 M. W. N. 406.
5. (1911) M. W. N. 179.
6. (1905) I. L. R. 29 M. 52 (at p. 56.)

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formance of personal service, though certain other circumstances (like the hereditary nature of the grant) tended in the other direction. No one fact is conclusive either way though it seems to me from the sentence I have quoted from page 446 of 13 M. I. A. that their Lordships of the Privy Council considered that, where the services were such as are reserved to the Zemindar personally, there can be very little doubt that the Inam was a resumable grant.

I would therefore dismiss the Second Appeal with costs.

By the Court :—The Appeal is dismissed with costs under S. 98 of the C. P. C.

[On Letters Patent Appeal.]

M. Patanjali Sastri for *P. Narayanamurti* for Appellant :—

The point for decision is whether the grant in this case is a grant burdened with service or is only a grant in lieu of wages. My submission is that the facts (1) that the grant was in consideration of past services also, (2) that the grantee is to enjoy the land granted from son to grandson etc., and (3) that Kattubadi is reserved to the grantor indicate that the grant is a permanent one subject to the condition that the grantee and his descendants should render service to the grantor and his heirs.

Forbes v. *Meer Mahomed* [1] is the leading case on the point. Even the non-reservation of Kattubadi in favour of the Zemindar was held by the Privy Council in that case not to affect the permanent nature of the grant. What the Privy Council said was that the non-reservation was a circumstance in favour of the grantor. If, in that case, Kattubadi had been reserved, that circumstance would have been held to be conclusive as to the permanent nature of the grant. See pp. 464,465. The question whether the services are public or private is relevant only to the questions (1) whether the land granted was included in the assets of the Zemindari and (2) who is entitled to resume—the Government or the Zemindar. That question is not material when the point to be decided is whether the Inam is to be held to be resumable at all. The cases referred to by Sadasiva Aiyar, J are distinguishable on that ground.

In *Raja Lilanund Singh Bahadur* v. *Thakur Manoranjan Singh* [2] the grant was held to be one burdened with service although there was no clear and unambiguous language in the grant that it was hereditary. In *Venkata Narasimha* v. *Sobhanadri* [3] on appeal from *Venkata Narasimha* v. *Sobhanadri* [4] the circum-

1. (1870) 13 M. I. A. 438.
2. (1873) 13 B.L R. 124 (132-3) (P.C.)
3. (1905) I. L. R. 29 M. 52. (P. C.)=16 M.L.J. 1.
4. (1902) I. L. R 26 M. 404.

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stances relied upon in support of the view that the grant was permanent, were (1) that the grant was stated to be hereditary, (2) that the Kattubadi was not varied, (3) the devolution of the property granted from the grantee to his heirs and (4) payment of batta for services rendered by the grantee. All those circumstances are present in the case before your Lordships. *Lakhamgavda* v. *Keshav Annaja* [1]. The case in *Sanyasi* v. *Salur Zemindar* [2] is distinguishable because (1) the, consideration of the grant was future service only, (2) Kattubadi was enhanced once or twice, (3) the deed of grant was not produced and (4) no plea was raised that the grant was not one in lieu of wages. *Mahadevi* v. *Vikrama* [3].is distinguishable in much the same way. *Sri Veerapratata Gajapathi Maharajulu Garu* v. *Sonti Prahlada* [4] is distinguishable because (1) the consideration was wholly future, and (2) the only question argued was whether the services were public or private *i.e*, who had the right to resume.

[*Chief Justice*:—Are there any cases of permanent grants in which the services to be rendered were of a private nature *i e.* menial ?]

The nature of the services to be rendered has in no case been regarded as material in determining whether the grant was permanent. *Lakham Gavda* v. *Keshav Annaji* [5], does not regard the nature of the service as material.

In *Radha Pershad Singh* v. *Bhuddu* [6], the service was that of a village watchman. In *Yellava* v. *Bhimappa* [7], the services were sweeping and lamp-lighting. See also *Bhahmat Prasad Dey* v. *Sheo Prasad Sahu* [8] and *Maharajah of Jeypore* v. *Sri Rukmani Pattamahadevi* [9].

S. Srinivasa Aiyangar for Respondent.

In this case there is not a mere deed of gift. There is a patta and muchilika, thereby indicating that a sort of tenancy is created.

[*Seshagiri Aiyar, J* :—If that is so, the grantee will have a permanent right of occupancy.]

There can be no occupancy right in the case of service tenures. Further, in the courts below no case was set up to the effect that the grant was in consideration of past services also.

1. (1904) I. L. R. 28 B. 305.
2. (1883) I. L. R. 7 M 268.
3. (1891) I. L. R. 14 M. 365.
4. (1914) M. W N. 179.
5. (1904) I. L. R. 28 B. 305.
6. (1895) I L. R. 22 C. 938.
7. (1914) 17 Bom. L. R. 128.
8. (1913) 18 C. W. N. 297 (305) F. B.
9. (1915) M. W. N. 346 (360).

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The recital in the deed as to past services is a mere motive operating on the mind of the grantor in making a choice as to the grantee. Past services are not part of the consideration for the grant.

[*Chief Justice*:—In an ordinary lease, there will be a right of re-entry reserved to the grantor in case of non-payment of rent. There is no such reservation in the present case in the event of failure to perform the services.]

That is always implied. The Privy Council has held that in the case of Service Inams the grant can be resumed in case of unwillingness on the part of the grantee to perform the services.

[*Seshagiri Aiyar, J*:—Is there any case in which mere omission to perform services has been held to be a ground for resumption?]

An inadvertent omission will not entail forfeiture, but unwillingness will. The question is, what was intended to be conveyed by the grant in question and in deciding that, the nature of the services, the wording of the document, *viz.*, that the land was granted as Service Inam, have all a material bearing. *Vadisandu Appandhora* v. *Vyrichendra Veerabhadra Raju* [1]. *Prima facie*, a "nowkari" Inam is an inam in lieu of wages only and the burden of showing that the Inam is not resumable is on the grantee. The expression "Service Inam" attracts to the grant the incident of resumability. Further even on the construction of the grant, the services to be rendered are such as will merit the approval of the grantor. The services to be rendered also depend upon the personal fitness of the man rendering them and upon the tastes of the Zemindar for the time being.

[*Seshagiri Aiyar, J*:—Why were the words "from son to grandson" put in the deed?]

To show that the descendants of the grantee were to enjoy the land if they were fit to render such serivces. The use of the words "from son to grandson" is not inconsistent with the resumable nature of the grant. The case in *Batchu Raja Appaji* v. *Sri Raja Rao Venkata Kumara Mahipathi* [2] shows that when a grant is made the continuance of which depends upon the pleasure of the grantor, the grant is resumable on the death of the grantor.

[*Seshagiri Aiyar, J*:—When a grant is stated to be from son to grandson subject to certain services, does not the fact that it is

1. (1911) 2 M. W. N. at 408. 2. (1911) 2 M.W. N. 552 at 554.

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from son to grandson, etc., raise the presumption that it is a grant burdened with service ?]

Forbes v. *Meer Mahomed Tuquee* [1] shows that if the service to be rendered is private, then the grant is resumable. See also p. 463. The point to be considered is whether the continued performance of the service is a condition of the grant or whether the performance of the service merely entered into the motive of the grant. The fact that the grant is stated to be hereditary is not material see p. 464.

Again, the grant of the emoluments attached to an office is the grant of the office itself. In the present case, the land is granted to the grantee by reason of his being an office holder. The deed calls the grantee "nakesh, etc.," and the grant is called "nowkari Inam".

[*Phillips, J*:—There is no reference to the nature of the services to be rendered.]

Because the word "nakesh" is used. The fact that the office goes by a particular designation is considered by the Privy Council as a very material circumstance. See *Krishnaji* v. *Vittal Rao* [2]. *Sitarama Raju* v. *Ramachandra Raju* [3] *Sannyasi Raju* v. *Ramachendra Raju* [4] *Mahadevi* v. *Vikrama* [5]. See the P. C. case at p. 367. In both cases reported in (14 Mad. the reservation of a small quit rent was held to be not inconsistent with resumption.

Venkatanarasimha v. *Sobhanadri* [6] *Sri Rajá Visnesher* v. *Gorla Badarahss* [7] *Vadisapu Appandhora* v. *Vyricherla Veerahbadra Raju* [8] *Idubilli Siyyadi Garu* v. *Sri Rajah Visveswara Nissanka* [9] *Vadisandu Appandhora* v. *Vyrichendra Veerabhadra Raju*[10] *Sri Rajah Sobhanadri Appa Rao Bahadur* v. *Sri Rajah Venkatanarasimha Appa Rao Bahadur* [11] and *Suryanarayana* v. *Secretary of State* [12]. The circumstances that (1) the grantee was described as nakesh, (2) the grant was called a Service Inam, (3) a small money rent was reserved, (4) the land granted was taken from ordinary jeroyati lands and placed in the category of service Inams and (5) the continuance of the grant

1. (1870) 13 M.I. A. 438 at 461.
2. (1887) I. L. R. 12 B. 80, 81.
3. (1881) I. L. R. 3 M. 367.
4. (1883) I. L R. 7 M 268.
5. (1891) I. L. R. 14 M. 365.
6 (1902) 13 M. L. J. 209.
7. (1910) M. W. N. 436.
8. (1911) 2 M. W. N. 406.
9. (1915) I. L. R. 18 M. L. T. 142.
10. (1914) M. W. N. p. 179.
11. (1902) I. L R. 26 M. 403 on appeal I. L. R. 29 M. 52 P. C.
12. (1914) I L W. 662.

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was made dependent upon the pleasure of the diwanum, show that the grant is not permanent and that it is resumable. The fact that the services to be rendered are private tells in two ways (1) that the land is resumable and (2) that it resumable by the Zemindar. The question who is to resume will not arise if the land is not resumable at all. See *Pershad Singh* v. *Budhu Dardad* [1] and *Brojanath Bose* v. *Durga Prosad Singh* [2] and *Rajah Nilmoney Singh Deo* v. *The Government and Beer Singh* [3].

M. Patanjali Sastri in reply.

The fact that the grantee was called "nakesh" does not show that the grant was of an office.

[*Chief Justice.*—Supposing the grantee had previously been rendering the services of a nakesh and the grant was made in confirmation of that office, why should it not be held that the grant was of the office ?.]

The fact that even after the grant the grantee was paid the same salary for the services that he had been paid before is conclusive against that construction. The word "nakesh" was used merely to describe the grantee. The fact that the grant was in consideration of past services also shows that the grant was not in lieu of wages. In the present case there was no enhancement of Kattubadi at all. The fact that the grant was called a service Inam is not against the view that the grant is permanent. It only shows that the grant is burdened with service *i. e.*, that the grantee cannot refuse to perform service and yet retain the land granted. In *Lakham Gavda* v. *Keshav Annaji* [4]. The fact that the services to be rendered are private raises a presumption that the grant is resumable.

[*Chief Justice.*—What circumstances are there in this grant which rebut that presumption ?]

One is the reference to past services as consideration for the grant. The expression " deserving patronage of diwanum ". does not show that the grant was resumable at the pleasure of the grantor. It simply shows that the grantor had an exaggerated notion of his importance *Maharaja of Vizianagaram* v. *Suryanarayana* [5] *Maharaja of Vizianagaram* v. *Sitarama Raju* [6]. The fact that the grant is a Service Inam is not conclusive of resumability *Forbes* v. *Meer Mahomed* [7].

1. (1895) I. L. R. 22 C. 938 P. C.
2. (1907) I. L. R. 34 C. 753, 782-3.
3. (1872) 18 W. R. 321 P.C.
4. (1904) I. L. R. 28 B. 305.
5. (1886) I. L. R. 9 M. 307.
6. (1895) I. L. R. 19 M. 100, 103.
7. (1870) 13 M. I. A. at 466.

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The Chief Justice.

The Court delivered the following

Judgments :—*The Chief Justice.*—This is no doubt a case very much on the line and has given rise to a difference of opinion between the District Munsif and the Subordinate Judge, and between the two learned Judges who heard the Second Appeal, and on the Letters Patent Appeal. On the whole I am disposed to agree with the conclusion of Sadasiva Aiyar, J. that there are not sufficient grounds for interfering in second appeal with the finding of the District Judge. As regards the disputed passage in *Forbes* v. *Meer Mahomed Tuquee* [1] I agree with Ayling, J. that their Lordships considered that the fact that in that case no quit rent had been reserved although the land had been included in the assets of the zemindari on which peishcush was payable, was a circumstance which taken with all the other circumstances of that case would have clearly negatived a power of resumption; but that was only one of the circumstances to be taken into account in the absence of a grant. Here we have the terms of the grant embodied in a pattah and muchilika. It is true that past services are mentioned by way of inducement, and that the land is to be enjoyed from father to son, but it is granted to the grantee who is described as nakesh for his services by which I understand his services as nakesh, and it is expressly provided that it is to be held as servant's Inam. Service Inams are admittedly resumable where Government is the grantor and in the case of darmilla Inams, that is to say Inams granted by Zemindars since the date of the permanent settlement, where they are service Inams granted for services of a personal nature, I agree with Sadasiva Aiyar, J. that the balance of authority in this presidency is in favour of their being resumable. The governing provision in my opinion is that they were to be held on service tenure, the service being the service of nakesh, and I think it follows that they must be considered resumable. See *Venkata Narasimha Appa Row* v. *Sobhanadri Appa Row* [2], *Vadisapu Appandora* v. *Vyrichendra Veerabhadraraju Bahadur* [3]; *Gajapathy Maharaju Garu* v. *Sondi Prahlada Bissoyi Ratno* [4]. For these reasons I would dismiss the appeal.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.:—The Zemindar of Pittapur sues to recover possession. The lands in suit were granted in 1868

1. (1870) 13 M. I. A. 466.
2. (1916) 18 M. L. T. 209.
3. (1911) 2 M.W.N. 406.
4. (1913) 14 M. L. T. 562=1914 M.W.N. 179

by the plaintiff's predecessor in title to one Mrutyanjayadu from whom the defendants claim (Exhibit I). Plaintiff's case is that the grant was by way of remuneration for services and that as he no longer requires the defendants' services, he is entitled to resume the lands. The Lower Appellate Court differing from the District Munsif gave a decree to the plaintiff. In second appeal, Ayling, J., was for reversing that decision, while Sadasiva Aiyar, J. was in favour of confirming it. Hence this Letters Patent Appeal.

The deed of grant when it is forthcoming should first be examined to see whether the grant is revocable or not. An analysis of the contents Exhibit I brings out the following statements: (1) It is a grant made to Nakesh Mrutyanjayadu. It must be explained here that the term nakesh denotes a decorator. It is common ground that this man was employed in painting pictures on the walls of the Samasthanam buildings; 2) it recites that the donee had rendered services in the past; (3) that the said services were acceptable to the donor; (4) that the lands were granted as service Inam; (5) that the grantee was to pay a fixed Kattubadi; (6) that he was, in future, to render services which would deserve the approbation of the diwanum; and (7) that the lands were to be enjoyed from son to grandson. In addition to the above statements a few more may be mentioned as a result of the findings of the Courts below; (8) the Kattubadi was never enhanced during the 45 years that the defendants were in possession of the land; (9) the lands had descended in the lineal line for 3 generations; (10) the defendants are and always have been willing and ready to render the service.

I have set out in detail the above circumstances, because in arriving at a conclusion regarding the nature of the grant, the cumulative effect of all of them have to be considered. The decided cases which I shall refer to, but not in detail, show what combination of circumstances constitute a grant of office, as distinguished from a grant of land burdened with the duties of an office.

Mr. Srinivasa Aiyangar for the respondent laid stress on the use of the word nakesh as a prefix to the grantee. I do not think that the word is anything more than descriptive of the person. It is admitted that prior and subsequent to the grant,

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a salary was paid for doing decorative work. Further, it is in evidence that the grantee and his successors were called upon to do *mochi* work; consequently, it is clear that the use of the expression nakesh was not intended to denote the office which was then being conferred. The learned vakil then relied upon the statement that the land "has been granted to you as service Inam". It is true that the presumption in Government grants is that the lands granted as service Inam are resumable. The same considerations do not necessarily apply to grants by Zamindars. It is well settled that service grants by Zemindars are not always resumable *Venkatanarasimha Appa Rao Bahadur* v. *Sobhanadri Appa Rao Bahadur* [1] and *Forbes* v. *Meer Mahomed Tuquee* [2]. The next contention is that as the service was personal, it was open to the Zamindar to dispense with it and to resume the land. Here again, it is not in every case of personal service that the grant can be resumed. In *Idubilly Siyyaddi* v. *Sri Rajah Viswaswar Nissanka* [3], the gadiba Service Inam was expressly granted for future services and as wages for those services. *Sri Raja Viseswara* v. *Gorla Budarado* [4] is to the same effect. In *Sanniyasi* v. *Salur Zemindar* [5] the grant was not produced, and it was found that the Kattubadi was enhanced from time to time. *Mahadevi* v *Vikrama* [6] belongs to the same category. On the other hand, in *Yellava* v. *Bhimappa* [7], a grant made for lamp lighting and other menial services was held not resumable. No general rule can be laid down, apart from other circumstances, that a grant for personal or menial services is liable to resumption. Mr. Srinivasa Aiyangar's next attack was directed to the use of the clause "you shall be rendering service so as to deserve the patronage of the diwanum". He argued that these words really meant that the grantee was to hold the lands during the pleasure of the grantor. I do not think this forced construction is sustainable. It is well-known that such expressions find place in grants by Zemindars and are suggestive only of the vain gloriousness of the grantor and not of any intention to cut down the effect of the grant. These words are a harmless enunciation of self-importance as pointed out by Mr. Patanjali Sastri for the appellant. *Vizianagaram Maharaja* v.

1. (1905) I. L. R. 29 M 52.
2. (1870) 13 M. I. A. 438.
3. (1918) 18 M. L. T. 142.
4. (1910) M. W. N. 436.
5. (1883) I. L R. 7 M 268.
6. (1891) I. L. R. 14 M 365.
7. (1914) 17 Bom. L. R. 131.

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Suryanarayana [1] and *Vizianagaram Maharaja* v. *Sitaramaraju* [2].

If we eliminate these considerations, we find that the grant was made in consideration of past services, that the Kattubadi first fixed was never enhanced, that it was hereditary and did descend from son to grandson, and that that grantee's heirs are ready and willing to perform the duties of Nakesh and of Mochi. These facts bring the case within the rule laid down in *Forbes* v. *Meer Mahomed Tuquee* [3] and *Raja Leelanand Singh Bahadur* v. *Thakore Munoranjan Singh* [4]. One paragraph in the former judgment of the Judicial Committee was claimed by both the learned vakils as favouring their respective contentions. The two learned Judges who differed in second appeal were prepared to hold that paragraph was in favour of the position taken by each of them. The paragraph runs thus: "Had this been a grant reserving to the Zemindar a small money-rent, as well as the services, if indeed the latter are reserved to the Zemindar, *their Lordships would have had no doubt upon the case.* But it seems to them that the unexplained anomaly of making *mal* lands rent-free in the hands of the Jaghirdars, does not affect the construction of the sanad, or the rights of the parties". In the previous paragraph, their Lordships held that if the parties wilfully fail to perform the service, the lands could be resumed, but pointed out that there was no longer any occasion for the performance of the services. Then they say that if a money-rent was reserved in addition to the services to be rendered, provided those services were personal, "*Their Lordships would have no doubt upon the case.*" The circumstance which rendered this sure position somewhat doubtful is mentioned in the next sentence, and that is the lands claimed were included in the *mal assets* of the Zemindari in settling the peishcush. In the view of their Lordships, it is an anomaly that such lands whose assessment was taken into account in settling the peishcush should be granted away permanently. This anomaly according to them is met sufficiently by the fact that there was a small money rent plus some personal services. Their Lordships held that the apparent anomaly "does not affect the construction of the sanad or the rights of the parties." It seems to me that their Lordships

1. (1886) I. L. R. 9 M. 308.
2. (1895) I. L. R. 19 M. 100.
3. (1870) 13 M. I. A. 438.
4. (18 3) 13 B. L. R. 124.

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regarded the payment of a fixed amount as a strong circumstance indicative of the permanancy of the grant made. I do not think any useful purpose will be served by examining the other authorities quoted at the bar. In my opinion, the present case is stronger than the one which the Judicial Committee had to deal with in *Forbes* v. *Meer Mahomed Tuquee* [1], and consequently, I hold agreeing with *Ayling, J.* that the plaintiff is not entitled to resume the lands. The appeal must be allowed and the suit should be dismissed with costs throughout.

Phillips, J.

Phillips, J.—The sole question for determination is whether the plaint Service Inam is resumable or not and the decision must depend upon the nature of the grant—as pointed out by their Lordships of the Privy Council in 1870 in *Forbes* v. *Meer Mahomed Tuquee* [1], and again in *Raja Leelanund Singh* v. *Munoranjan Singh* [2], where it was recognized that there is a clear distinction between the grant of an estate burdened with a certain service and the grant of an office the performance of whose duties are remunerated by the use of certain lands. In both cases a particular grant of the former class was held to be irresumable. The view that a grant of land burdened with service, that is to say a grant of land to which is attached a condition that the holder shall perform a certain service, is not resumable at the will of the grantor so long as the holder is able and willing to perform the service, has been consistently held by the courts in India ever since the decision in 13 M. I. A. 438, but I need not refer to them in detail as on this point there is no real dispute between the parties to this appeal, the same view having again been clearly enunciated by the Privy Council in *Venkata Narasimha Appa Rao Bahadur* v. *Sobhanadri Appa Rao Bahadur* [1]. In this latter case their Lordships enumerated the reasons which in their view were sufficient ground for holding that the grant was one subject to a burden of service and not a grant in lieu of wages as follows :—" In the first place," "no office by any particular designation was conferred upon the original grantee, but an obligation of a feudal character was imposed upon him. He was simply to provide a specified number of men as custodians, so to speak, of the Zemindar's property, and their services appear to have been rendered intermittently and not continuously. Besides, they were paid in money when they actually performed such services that

1. (1870) 13 M. I. A. 438. 2. (1874) L. R. I. A. Sup. Vol. 181.
1. (1905) I. L. R. 29 M. 52.

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is to say, batta was given to them when actually on duty. It is also certain that in later years their services were not in frequent requisition, because, as Mr. Taylor points out in his report, the Zemindars would have had to pay in the shape of batta more than the services were worth. In the second place, the following circumstances indicated as plainly as possible a fixity of tenure. The mokhasadars have paid a uniform rent of Rs. 144 a year for the last 120 years without alteration at any time, and the land has descended from father to son hereditarily. There has been no instance of resumption or even an attempt at resumption during all this time. There has also been no attempt to enhance or to alter the rent, or to interfere with the devolution of the property from heir to heir."

In the present case the grant is made to one "nakesh" Mritunjayadu as 'Service' Inam but the nature of the service is not specifically stated in the grant, but it is admitted that the service was that of nakesh or decorator, and that the holder also performed Mochi Service. The word nakesh prefixed to the grantee's name appears to me to be a mere title. The rent payable on the land has always been the same, and the grant recites that enjoyment shall be from son to grandson and so on in succession, and as a matter of fact, the land has descended to the holder's son and grandson without objection till now, nor has any attempt been made before this to resume the grant or enhance the rent. We also have the recital in the grant "as you who are deserving of the patronage of the diwanum have been rendering service properly you were favoured and lands have been granted," which certainly goes to show that the grant was a reward for past services, and that this was so is further proved by the fact that the grantee's services were recompensed by the same salary both before and after the grant, and this is a very strong piece of evidence that the grant was not made in lieu of wages. The circumstances of this case appear to me to be stronger than those in *Venkata Narasimha Appa Rao Bahadur v. Sobhanadri Appa Rao Bahadur* [1] in support of the view that the grant is not one in lieu of wages. The fact that the nature of the service is in this case personal does not affect the question, which depends solely on the nature of the grant, and for the same reason it is immaterial whether the service is of a feudal

1. (1915) I. L. R. 29 M. 612.

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nature or otherwise. In *Vadisapu Appandora* v. *Vyricherla Veerabhadraraju Bahadur* [1] to which I was a party, it was held that in the case of a grant subsequent to the Permanent Settlement to which services of a personal nature were attached there is in the absence of any evidence a presumption that the grant is resumable, but in this case the presumption has been amply rebutted by the circumstances mentioned above. I therefore agree with *Ayling, J.* that this is a grant which is not resumable so long as the grantee is able and willing to perform the service. I have not thought it necessary to refer to the very numerous cases cited on both sides in which the law, as I understand it, has been applied to the circumstances of each particular grant and the nature of the grant interpreted accordingly, because each case must be decided on its own merits.

By the Court:—In the result, the appeal is allowed and the suit dismissed with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
FULL BENCH.

Present:—Sir John Wallis, Chief Justice, Mr. Justice Seshagiri Aiyar and Mr. Justice Phillips.

Rama Aiyar died, Lakshmana Aiyar, Supplemental appellant and legal representative of the deceased 1st appellant *vide* Order, dated 6-8-1914 on C. M. P. No. 988 of 1914. ... *Appellants* * *(Petitioner and his legal representative.)*

v.

Krishna Patter ... *Respondent (Counter-Petitioner.)*

Rama Aiyar v. Krishna Patter.

Private International Law—Submission to jurisdiction—Civil Procedure Code S. 44—Appearance and defence on protest—to get a refund from son to whom debt was paid and to avoid arrest—submission nevertheless.

When a decree of a Court in the Cochin State was sought to be executed in the Sub-Court of Palghat, it was objected that the Cochin Court had no jurisdiction to make the decree. Though the defendant had appeared and defended the suit against him, he had protested against the jurisdiction of the Court both in the Court of the 1st Instance and in the Appellate Court. His reasons for appearing and defending were (i) that his creditor's son to whom he had repaid the suit debt refused to refund him the money unless he defended the suit brought by the father (ii) that if a decree was passed against him he might be arrested when he went to Cochin on business or to see his relations.

Held on a reference to the Full Bench that under the circumstances there was a submission to jurisdiction and the decree could not be impeached by the deft.

Parry and Co. v. *Appasami Pillai* [2] overruled.

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* A. A. O. No. 120 of 1912. 26th December 1915.

1. (1911) 2 M. W. N. 406. 2. (1880) I. L. R. 2 M. 407.

Appeal against the decree of the District Court of South Malabar dated the 19th August 1912 in A. S. No. 169 of 1912 preferred against the order of the Court of the Subordinate Judge of Palghat in E. P. No. 1471 of 1911 in O. S. No. 134 of 1084 on the file of the District Court of Anjikaimal (A. S. No. 50 of 1085 on the file of the Chief Court, Cochin.)

This appeal came on for hearing before Oldfield and Tyabji, JJ. who delivered the following

Judgment:—Since the hearing in the Lower Appellate Court some of the questions between the parties have been set at rest by the Full Bench decision in Letters Patent Appeal No. 71 of 1913 dated 6th October 1914.

In consequence of it there is now no suggestion that the Court cannot enquire into the binding nature of a foreign decree, of which execution is sought.

The question is next whether the decree is binding and therefore executable in consequence of the respondent's submission to the foreign Court's Jurisdiction. The decision referred to decided at least that a party, who pleads in a foreign Court (although after protest), does not submit to its jurisdiction, if he does so in order to protect his property in that jurisdiction from attachment and perhaps sale. The respondent contends that it further left open the question whether the presence of an intention to avoid any other or lesser inconvenience, such for instance as the possible attachment of property, which the party might bring within the jurisdiction in future would deprive his appearance or pleading of its character as a submission. Vide *Parry and Co.* v. *Appasami Pillai* [1]. Before dealing with this, we think it advisable to have the facts clearly before us. We therefore call on the Lower Appellate Court to find on the issue,

> " What were the facts or reasons, which led the respondent to appear and plead in the foreign Court ?"

Fresh evidence may be taken. The finding is due in six weeks. Seven days will be allowed for filing objections.

In compliance with the above order of this Court, the District Judge of South Malabar submitted the following

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FINDING :—

A finding is called for on the issue :—"What where the facts or reasons, which led the respondent to appear and plead in the foreign Court?" Krishna Pattar, the respondent, states in evidence that the money, which Rama Aiyar, the plaintiff in O. S. No. 134 of 1084 in the District Court of Anjikaimal in the Cochin State, sued to recover was borrowed by him from Kailasa Aiyar, son of Rama Aiyar. He says that he had borrowed the money from Kailasa Aiyar for his trade in gold and repaid it at the request of the latter in Madras obtaining a receipt (Exhibt I) in acknowledgment of the amount paid and the letter (Exhibit II). When Rama Aiyar brought the suit against him he was asked by Kailasa Aiyar to contest the Suit and contend that the money had been paid back at his request. He states that Kailasa Aiyar said to him that unless he so contested the suit he would not refund the money to him in the event of his father obtaining a decree against the respondent. The respondent further explains that if a decree were obtained against him he might have been arrested when he went to Cochin State as he used to do to carry on his trade and to see his relations. The conversation about the suit between Rama Aiyar and the respondent is also mentioned by his 2nd witness, Samu Pattar, a trader of Palghat who also says that respondent paid back the money borrowed from Rama Aiyar in Madras as requested by Kailasa Aiyar. His brother-in-law, the 3rd witness, Anantarama Patter speaks of the trade of the respondent in Cochin (*vide* Exhibits III to VIII) and states that the respondent contested the suit because he did not want to be arrested when he went there on business. The appellant who is the legal representative of the plaintiff in the suit did not examine any witness. He relied mainly on the proceedings in the Anjikaimal Court in that suit (Exhibits H. J. B. C. D E. F. and G) to show that the plea of the respondent is not true and that he merely contested the suit because he expected to win it. But it is clear that the plea of want of jurisdiction was expressly raised by the defendant and the fact that he contested the suit on its merits does not show that it was not with the object of avoiding inconvenience of having a decree against him in the Cochin State. I see no reason on the whole to reject the evidence of the respondent and his witnesses as to the reasons which led him to contest the suit and I find on the issue that the respondent appeared and pleaded in the District Court of Anjikaimal under the circumstances now stated by him.

This appeal came on for final hearing after the return of the finding of the Lower Appellate Court upon the issue referred by this Court for trial.

The Court *(Tyabji and Phillips, JJ.)* made the following

ORDER OF REFERENCE TO A FULL BENCH.

Tyabji, J.:—This appeal arises out of an application under S. 44 of the Civil Procedure Code for execution of a decree passed in the Courts of the State of Cochin. It is admitted that there is such a notification with reference to the Courts in Cochin as is mentioned in that section.

It has been recently held and was not questioned before us, that such an application may be resisted on the grounds mentioned

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in S. 13 of the Civil Procedure Code *Veeraraghava Aiyar* v. *Muga Sait* [1].

The present application is resisted on the ground that the foreign Court was not of competent jurisdiction: S. 13 (*a*) of the Civil Procedure Code.

It is admitted that the Courts in Cochin had jurisdiction in accordance with the laws of Cochin. But whether a foreign Court is or is not a Court of competent jurisdiction within the meaning of S. 13 (*a*) has to be determined in accordance with the principles of international law and not in accordance with the law of the country in which the foreign Court is situated. See *Pemberton* v. *Hughes* [2] where it is said "The jurisdiction which alone is important in these matters is the competence of the Court in an international sense:—*i. e.*, its territorial competence over the subject matter and over the defendant. Its competence or juridisction in any other sense is not regarded as material by the Courts of this country." See also *Christien* v. *Delanney* [3] and *Shaik Atham Sahib* v. *Davud Sahib* [4]. In *Pemberton* v. *Hughes* [5] the question was (as it always is in England) where a suit would lie in England on a foreign judgment. S. 44 however permits execution to be obtained on the foreign judgment itself.

Whether S. 44 does not proceed on the principle of "comity" as that expression is understood in *Schibsby* v. *Westenholz* [6] has not been argued before us, and I will assume that the principle of "comity" has no bearing on judgments falling within S. 44. The difference between the two aspects is thus explained in *Schibsby* v. *Westenholz*[6] "and we think that if the principle on which foreign judgments were enforced was that which is loosely called "comity", we could hardly decline to enforce a foreign judgment given in France against a resident in Great Britain under circumstances hardly, if at all, distinguishable from those under which we, *mutatis mutandis*, might give judgment against a resident in France: but it is quite different if the principle be that which we have just laid down": the latter principle being thus explained "we think that for the reasons there given, the true principle on which the judgments of foreign tribunals are enforced in England is that stated by Parke, B. in *Russell* v. *Smyth* [7] and again repeated by

1. (1914) 27 M. L. J. 535.
2. (1899) 1 Ch. 781.
3. (1899) I. L. R. 26 C. 931.
4. (1909) I. L. R. 32 M. 469.
5. (1899) 1 Ch. 781.
6. (18?0) L. R. 6 Q. B. 155.
7. 9 M. and W. at p 819.

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him in *Williams* v. *Jones* [1] that the judgment of a Court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given which the Courts in this country are bound to enforce; and consequently that anything which negatives that duty or forms a legal excuse for not performing it, is a defence to the action."

The cases in which foreign Courts are in England recognised to be internationally of competent jurisdiction in regard to suits of a personal nature have been stated by Fry, J. in *Rousillon* v. *Rousillon* [2] to include the following five.

1. "Where he is the subject of the foreign country in which the judgment has been obtained;
2. Where he was resident in the foreign country when the action began;
3. Where the defendant, in the character of plaintiff, has selected the *forum* in which he is afterwards sued;
4. Where he has voluntarily appeared;
5. Where he has contracted to submit himself to the *forum* in which the judgment was obtained."

In the present case only the 4th head need be considered. It is impliedly recognised as a source of international competence in *Gurdyal Singh* v. *Raja of Faridkot* [3], as a decree of a foreign Court to the jurisdiction of which the defendant has in any way submitted himself is in their Lordships' judgment excepted from those decrees which are described as being by international law a nullity.

What we have to decide therefore is whether or not the respondent had voluntarily appeared in the Cochin Court, or to use Lord Selborne's words in the *Faridkot* case, whether or not he had in any way submitted himself to the jurisdiction of the Cochin Courts.

Both the Lower Courts have answered this question in the negative, and the question before us narrows itself down into whether there is any evidence on which they could have held that the defendant's appearance was caused by duress so as to prevent his appearance having the effect of clothing the Courts of Cochin with jurisdiction under the 4th head.

1. 13 M. and W. at p. 633. 2. (1880) 14 Ch. D. 351, 371.
3. (1894) I. L. R. 22 C. 222 at p. 238.

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The facts are as follows:—

A sum of Rs. 2,300 was due from the respondent (Krishna Pattar) to the appellant (Rama Aiyar). The respondent paid this sum to Kailasa Aiyar, the son of Rama Aiyar. Rama Aiyar repudiated the payment to his son as a proper payment to himself, and brought the suit in the Cochin Courts. The respondent appeared in the Cochin Courts under protest, but pleaded on the merits. His defence on the merits was upheld in the Court of First Instance in Cochin, but that decision was reversed by the Appellate Court. Both Courts decided against the respondent on the question of jurisdiction. The respondent says that his appearance was not voluntary having been actuated by the following circumstances:—

(1) "He states" (in the words of the District Judge) "that Kailasa Aiyar said to him that unless he so contested the suit he would not refund the money to him in the event of his father obtaining a decree against the respondent.' In other words, a third party, Kailasa Aiyar, required the respondent to contest the suit and said to him that unless the suit was contested he (Kailasa Aiyar) would not refund the money which had been paid to him by the respondent on behalf of his father.

(2) "The respondent further explains that if a decree were obtained against him he might have been arrested when he went to Cochin State as he used to do to carry on his trade and to see his relations."

Do these two circumstances furnish any evidence that the appearance of the respondent in the Cochin Courts was under duress?

Great reliance was placed by the respondent upon *Parry and Co.* v. *Appasami Pillay*, [1] the principle of which decision appears in the following sentences. "The grounds on which those decisions proceeded were that the defendant, by appearing in the foreign Court and taking no objection to its jurisdiction, had for the time put himself under the jurisdiction of the Court and had led the plaintiff to believe that the proceedings were allowed by him to be effectual, and encouraged the plaintiff to proceed on them instead of withdrawing from them and instituting proceedings elsewhere." Mr Justice Muthuswami Aiyar whose decision was upheld had said in *Parry & Co.* v. *Appasami Pillay* [1]. " The true test seems to be something in the

1. (1880) I. L. R. 2 M. 407.

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conduct of the defendant which amounts to a voluntary submission to jurisdiction and which might amount to a breach of faith if the defendants were allowed to question the jurisdiction of the foreign Court."

The true principle however seems to be, not that good faith estops the defendant from questioning the jurisdiction of a Court which in fact has no jurisdiction; but that the fact of the defendant appearing and pleading on the merits, and thus taking a chance of a decision being given in his favour (and inviting the Court to pronounce on the merits) makes that Court internationally competent to adjudicate on the merits, in the same manner as is done by residence (even temporary) of the defendant in the foreign country, or by a contract made prior to the suit by the defendant with the plaintiff to submit himself to the jurisdiction of the Court. Applying the test approved of in *Schibsby* v. *Westenholz* 1, it may be said that when a person appears before a foreign Court and takes the chance of a judgment in his favour, there is a duty cast upon him to obey that judgment even if it goes against him.

On the other hand, of course, where the defendant's appearance is not voluntary, but brought about under duress, the Courts cannot give to such an act any legal consequence: and "the case will be treated as though he had not appeared" (*Voinet* v. *Barret* 2 per Lord Esher). It has been assumed that one example of such duress is where property having been "seized by the foreign tribunal in order to compel appearance" *Ibid* per Cotton, L. J.), the defendant appears under protest in order to protect such property. On the other hand, it has been said by Lord Esher, M. R., in the same case that the mere fear that things which may be afterwards carried into the foreign country will be seized is not such pressure as will prevent appearance from being voluntary under head 4 above: and Lord Justice Bowen said "A man cannot be said to be compelled to appear because if he does not do so, he may be inconvenienced in the long run" (page 42). This case would therefore appear to be directly against the contention of the respondent and it is only to be considered whether we are bound to follow the decision in *Parry & Co.* v. *Appasami Pillai* 3 in preference *Voinet* v. *Barret* 2.

1. (1870) L. R. 6 Q. B. 155. 2. (1885) 55 L. J. Q. B. 39, 40.
3. (1880) I. L. R. 2. M. 407.

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Parry and Co.'s case has, no doubt, stood in the Indian Law Reports for a long time, and there is much substance in the contention that we ought not to depart from it lightly as many parties may have proceeded on the basis of its correctness. But international law develops rapidly. The attitude of the Courts towards foreign judgments has certainly greatly changed since Lord Ellenborough said, "I will look to these foreign judgments with great jealousy" *Molony Esquire* v. *Gibbons.*[1] Now the legislature of British India requires some of them to be executed as if they had been passed by the Courts of British India. Moreover the decision in *Parry's case* has recently been greatly canvassed and its soundness doubted in *Veeraraghava Aiyar* v. *Muga Seit*[2]. It was not followed in C. M. S. A. No. 26 of 1914 where the English decision in *Boissiere* v. *Brockner*[3] was followed without reference to. *Parry & Co.* v. *Appasami Pillay*[4]. The Decision in C. M. S. A. No. 26 of 1914, however, proceeded mainly on the ground that the defendant had filed an appeal from a decision against the foreign Court and in the appeal he had taken no objection to jurisdiction. On the other hand, Sadasiva Aiyar, J. one of the learned Judges who decided (L. P. Appeals Nos. 133 to 135 of 1913) *Narayana Moothad* v. *Cochin Sircar,*[5] was prepared to follow *Parry & Co.* v. *Appasami Pillay*[4].

We have therefore the fact that there is a decision of this Court of long standing which has not been expressly overruled by a Full Bench and which Sadasiva Aiyar, J. is prepared to follow in favour of the respondent. It is argued by the respondent that this consideration is strengthened by the fact that the only alternative to following *Parry & Co.* v. *Appasami Pillay*[4], is that we should follow the English decisions; and that the latter alternative ought not to be adopted for this additional reason that the present state of authorities in England leaves the law in an unsatisfactory condition. (See Westlake's Private International Law, 5th Edition 406.)

The facts with reference to voluntary or involuntary submission to jurisdiction under protest must (according to Professor Westlake's view of the present English authorities) be arranged under one of three heads.

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1. 2 Camp. 502.
2. (1914) 27 M. L. J. 535 at p. 558 and 564.
3. (1889) 6 Times L. R. p. 85.
4. (1880) I. L. R. 3 M. 407.
5. (1915) M. W. N. p. 53.

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(1) When the property of the defendant is at the date of appearance actually in the hands of the foreign Court;

(2) When the defendant possesses property which at the same date is within the grasp of the foreign Court, but not actually seized by it;

(3) When the defendant has business transactions in the foreign country and is frequently in such position that a judgment in a Court of that country could be executed against him there.

When the facts fall under the first head the submission to jurisdiction has been considered (without ever having been so decided) to be involuntary; under the other two heads it has been held to be voluntary.

Professor Westlake points out that there cannot be any real distinction between the amount of pressure in cases (1) and (2). (This was the view of Wallis, J. in *Voinet* v. *Barret* [1] reversed in appeal 55 L. J. N. S. Q. B. 39. Nor is there any solid distinction between cases (2) and (3). It would follow therefore that logically all 3 cases must result in the same manner *i. e.*, either in each of these cases it ought to be considered that the submission has been voluntary, or the reverse.

We have therefore three alternative courses open to us.

I. To hold (as held in *Parry's case*) that in all three cases the submission is involuntary; in which case "the principle that jurisdiction is given by voluntary appearance would be practically abandoned." This principle has, however, as Professor Westlake points out, not been abandoned in *Boissiere* v. *Brockner* [2] nor in *Carrick* v. *Hancock* [3] still less, it may be added, in *Guiard* v. *De Clermont and Donner* [4].

II. To follow the English authorities as they stand, notwithstanding that they are anomalous.

III. To hold that in all three cases the submission is voluntary, which would be opposed to the dicta that when a person appears to protect his property, his submission may be considered to be brought about by duress and have no effect in conferring jurisdiction.

The trend of the most recent decisions in England is, however, in favour of this last course namely, to recognise a foreign

1. (1885) 54 L. J. N. S. Q. B. 521.
2. (1889) 6 T. L. R. 85.
3. (1895) 12 T. L. R 59.
4. 30 T. L. R. 511.

judgment whenever the defendant has appeared. Cf. *Guiourd* v. *Declerment and Donner* [1] and the remarks on it in *Veeraraghava Aiyar* v. *Muga Sait* [2]. In favour of the same view must be mentioned the principle that if the defendant takes the chance of a decision in his favour then he is bound: whenever he appears and defends the action on the merits, he takes such a chance. The fact that the defendant is even temporarily resident in the foreign country itself gives jurisdiction to the Court, the question of the time during which he has actually been in the country is wholly immaterial *Carrick* v. *Hancock* [3]: Jurisdiction may be given by agreement between the parties and where the suit is on a contract it has sometimes been held by the Courts that by implication there was a contract that the foreign Court should have jurisdiction. It is important to note also that possession by the defendant of property in the foreign country is by itself considered by some countries, including Scotland, to be sufficient to give jurisdiction to the foreign country. See Dicey's Conflict of Laws 2nd Edition pp. 56, 57, Story's Conflict of Laws 8th Edition Section 549 where it is recognised that the property in the foreign country may be seized and attached and the decree is held not to be binding personally only if the defendant" has never appeared and contested the suit." See also *Douglas* v. *Forrest* [4] which was however doubted in *Schibsby* v. *Westenholz* [5], and in the *Faridkot case* the possession of property was held to be no ground for jurisdiction. But it may be added that when the property is of sufficient value to induce the defendant to appear and defend the suit, the test of effectiveness, on which Professor Dicey bases the whole theory of the international competence of Courts, is satisfied.

On the other side and in support of the view that when property has been seized by the foreign Court appearance should be considered involuntary and be deemed insufficient to clothe that Court with jurisdiction we have in the first place the remarks in *Voinet* v. *Barrett* [6] though the actual decision was that the appearance was under such circumstances as to give jurisdiction to the Court. Professor Dicey says on this point. "The distinction suggested rests on good authority" (the authority is not cited) "but is not entirely satisfactory".

1. (1914) 30 T. L.R. 511=1914 III K.B 145.
2. (1914) 27 M. L. J. 535.
3. (1895) 12 T. L.R. 59.
4. (1828) 4 Bing. 686 at p. 703.
5. (1870) L. R. 6 Q. B. 155 at p. 163.
6. (1885) 55 L. J. Q. B. 39.

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(Conflict of Laws p. 371 foot note 2). Professor Westlake on the other hand is in favour of the view that appearance in such circumstances does not bind the defendant, saying that otherwise "the defendant would be bound to abandon his property abroad as the price of saving his English property from the grasp of a Court having *ex-hypothesi* no international jurisdiction in the case" (p. 406). He is also of opinion that the obvious leaning of Lord Blackburn and his colleagues in *Schibsby* v. *Westenholz* [1], was in the same direction. The passage cited immediately before this remark is "we think it better to leave this question open and to express no opinion as to the effect of the appearance of a defendant where it is so far not voluntary that he only comes in to try to save some property in the hands of the foreign tribunal. But we must observe that the decision in *Decosse Brissac* v. *Rathbone* [2], is an authority that where the defendant voluntarily appears and takes the chance of a judgment in his favour he is bound" (Westlake p. 406).

There seems, however, to be no decision of the English Courts that when property has been seized by the foreign Court, the defendant's subsequent appearance must be considered to be ineffectual in the sense that the Court is not then competent to pronounce an internationally effective judgment. The *obiter dicta* in *Voinet* v. *Barrett* [3] and Professor Westlake's opinion that such ought to be the law are of course of the greatest weight. But it seems to me as I have already said that the trend of the most recent authorities, the view taken by the Courts of Scotland and other countries and the test of effectiveness mentioned by Professor Dicey all indicate that the law will develop in another direction. As to Professor Westlake's remarks cited above, the defendant virtually abandons his foreign property as soon as he fails to defend the suit successfully: for such property being within the jurisdiction of the foreign Court can be seized in execution of the foreign judgment. See Story, Conflict of Laws, Section 549. In the present case the defendant appeared and took the chance of a judgment in his favour. The authorities are quite clear that in such a case the foreign Court has jurisdiction *Schibsby* v. *Westenholz* [1], *Harchand Panaji* v. *Gulabchand Kanji* [4]. No expression of opinion is necessary on the question whether if his property had been seized the Court would

1. (1870) L. R. 6 Q. B. 155 at p. 163
2. (1861) 6 H. & N. 301.
3. (1885) 55 L. J. Q. B. 39.
4. (1914) I. L. R. 39 B. 34.

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or would not have been deprived of its international competence, as no property had been seized. All I need say is that in my opinion in the present case there is no evidence from which it can be inferred that the defendant appeared in the Cochin Courts through such duress as to render his appearance devoid of the effect which it would ordinarily have under the 4th head mentioned by Fry J.

My reference to some of the more general aspects of the question was necessary only in order to determine whether we ought to follow *Parry and Co.* v. *Appasami Pillai* [1] and hold, contrary to the English authorities, that though the defendant appears and pleads on the merits, his denial that the Court has jurisdiction is sufficient to prevent the Court from becoming internationally competent.

The distinction between voluntary and involuntary appearance in the 3 cases mentioned by Professor Westlake may be admitted to be unsatisfactory. But if in all the three cases the same decision comes to be given in England, it seems to me that that decision will be that in each case the Court becomes competent by the defendant's appearance. Hence in any case *Parry and Co.* v. *Appasami Pillay* [1] should not in my opinion be followed, when (as in the present case) it is opposed to English decisions, as far as they have already proceeded. If I had thought that the trend of the English decisions was in favour of the view in *Parry and Co.* v. *Appasami Pillai* [1] it would have been proper to follow it, but as I have already said it seems to me to be emphatically in the reverse direction.

I should myself be inclined therefore to allow the appeal but as my learned brother thinks that we ought not to disregard *Parry and Co.* v. *Appasami Pillai* [1] unless it is overruled by a Full Bench I agree to refer the following questions to a Full Bench of this Court :—

1. Where there is an application under S. 44 of the Civil Procedure Code for execution of a foreign judgment and the judgment-debtor objects on the ground that the judgment was given by a foreign Court that had no personal jurisdiction over him inasmuch as he was not resident within the territorial jurisdiction of that Court,

(*a*) Is such objection to be upheld where it appears that

1. (1880) I. L. R. 2 M. 40.

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the judgment-debtor had objected to the jurisdiction of the foreign Court when sued there, or

(b) Will the fact that the judgment-debtor has appeared to contest the suit on the merits and taken the chance of a judgment in his own favour conclude him from taking any objection to the jurisdiction of the Court, irrespective of the question whether his appearance has been voluntary ? or

(c) Will the defendant be concluded only if his submission to the jurisdiction was voluntary ?

(d) If the third alternative is answered in the affirmative is the submission voluntary where the defendant appears in the circumstances of the present case ?

2. Was *Parry and Co.'s case* [1] rightly decided ?

Phillips, J. :—The facts of the case are set out in my learned brother's judgment. The only question for consideration is whether the respondent voluntarily submitted to the jurisdiction of the Cochin Court, which passed the decree which it is now sought to execute. The respondent appeared and defended the suit against him in the Cochin Court, but he protested against the jurisdiction of the Court. He renewed his protest in the Appellate Court, and has now taken the same objection in execution of the decree. His reasons for appearing and defending the suit were, as found by the learned District Judge, (1) that his creditor's son to whom he had repaid the suit debt refused to refund him the money unless he defended the suit brought by the father, (2) that if a decree were passed against him he might be arrested when he went to Cochin on business or to see his relations. In *Parry and Co.* v. *Appasami Pillai* [1] the reason for the defendants' submission to a foreign tribunal as given in the judgment (page 412) is "to escape the inconveniences which would attend a judgment against them, if at any time they or their property might be found in French territory." That case is therefore on all fours with the present case and if that ruling is to be followed this appeal would have to be dismissed. The authority of the ruling has, however, been recently doubted by the learned Chief Justice and Seshagiri Aiyar, J. in *Veeraraghava Iyer* v. *Muga Sait* [2] in consequence of the decision in *Boissiere* v. *Brockner* [3]. There are also other English decisions which

1. (1880) I. L. R. 2 M. 407. 2. (1914) 27 M. L. J. 535.
3. (1889) 6 Times L. R 85

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are opposed to the ruling in *Parry and Co.* v. *Appasami Pillai* [1] *Schibsby* v. *Westenholz* [2] 55 L. J. Q. B. 39; 14 Ch. D. 351; and 30 L. J. Rep. Exch. 238. In a very recent case *Harris* v. *Taylor* [3] where the defendant put in an appearance conditionally and applied to the Court to set aside the order for service out of the jurisdiction but did not even defend the action, it was held that the defendant had voluntarily submitted to the jurisdiction because he had sought the protection of the Court. The principle that is apparently applied in the English cases is that when a defendant submits to jurisdiction, except under duress, he is bound by the decision of the Court, because he has elected to take the chance of a decision in his favour and cannot be allowed to demur to a decision against him. A mere protest against jurisdiction does not make his submission involuntary. The ruling in *Parry and Co.* v. *Appasami Pillai* [1] is the concurrent decision of 3 Judges and proceeds on the grounds that a defendant having protested against jurisdiction puts the plaintiff on his guard and does not lead him to believe that the proceedings will be allowed to be everywhere effectual. This point of view is quite different from that adopted by the English Courts, and in a question like this, which is one of International Law, Indian Courts must be guided by the decisions of English Courts. The law however as laid down in *Parry & Co.* v. *Appasawmi Pillay* [1] has been the law in this Presidency, where the circumstances are not the same as in England, for over 35 years and has not been altered, notwithstanding the decision in *Voinet* v. *Barret* [4]. On the principle of *Stare decisis* I am not prepared to dissent, unless and until that decision is overruled by a considered decision of a Full Bench. I therefore agree to refer to a Full Bench the questions proposed.

T. R. Krishnaswamiaiyar for Appellant.

The question for decision is whether filing a written statement protesting against jurisdiction and also pleading on the merits amounts to a voluntary submission to the jurisdiction of a foreign Court. My submission is it does. See *Harris* v. *Taylor* [3] *Harchand Panaji* v. *Gulabchand Kanji* [5] *Veeraraghava Aiyar* v. *Muga Sait* [6]. The decision in 2 M. 407 is no longer correct.

1. (1880) I. L. R. 2 M. 407.
2. (1870) L. R. Q. B. 155 at p. 163.
3. (1915) 2 K.B. 580 C.A.
4. (1885) 55 L. J. Q. B. 39
5. (1914) I. L. R. 39 B. 34
6. (1914) 2 M. L. J. 535 (558).

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(At this stage their Lordships stopped the vakil and called upon the respondent.)

L. A. Govindaraghava Aiyar for *C. V. Anantakrishnaiyar* for respondent:—

The only case against me is that reported in *Boissiere* v. *Brockner* [1]. The other cases are distinguishable. Of the Indian cases, except those reported in *Harchand Panaji* v. *Gulabchand Kanji* [2] and *Veeraraghava Aiyar* v. *Muga Sait* [3] there is no other case going the length of *Boissiere* v. *Brockner* [1], which was only the decision of a single judge. The case in *Harris* v. *Taylor* [4] is not really against me. In that case the defendant admitted he was bound by the laws of the Isle of Man and pleaded only that, even according to those laws, the Isle of Man Court had no jurisdiction. There was no plea in that case founded on the principles of International Law.

Guiourd v. *Declermont and Donner* [5] is also distinguishable. The case reported in 2 P. D. 29 is authority for the position that an appearance under protest is not a waiver. The correctness of the decision in *Boissiere & Co.* v. *Brockner & Co.* [1] has been doubted by Dicey in his Conflict of Laws pp. 361, 370.

In the case reported in *Voinet* v. *Barrett* [6], there was appearance and no protest.

[*Chief Justice.*—Protest is not what is material. It is the appearance that matters. The defendant's property was seized in execution of a decree obtained against him in default of appearance and he objected to the service on the ground that the decree was not valid as against him. But the court held that that very act of objecting constituted submission.] See Dicey p. 370.

[The correctness of the opinion of Dicey on that page was attacked before the Court of Appeal in *Harris* v. *Taylor* and the Court of Appeal did not accept his opinion and approved of the decision of Cave, J in 6 T. L. R.—Chief Justice.]

The circumstances of this country ought also to be borne in mind in applying the principles of the English cases—See observations of Seshagiri Aiyar J. in *Veeraraghava Aiyar* v. *Muga Sait* [3]. See also *Narayana Moothad* v. *Cochin Sircar* [7] *Schibsby* v. *Westenholz* [8].

1. (1889) 6 T. L. R. p. 85.
2. (1914) I. L. R. 39 B. 34
3. (1914) 27 M. L. J. 535 F. B.,
4. (1915) 2 K. B. 580.
5. (1914) 3 K. B. 145
6. (1885) 55 L. J. Q. B. 39 (40).
7. (1916) 29 M. L. J. 667.
8. (1870) L. R. 6 Q.B. 155 (162).

Rama Aiyar v. Krishna Pattar.

Parry and Co. v. *Appasami Pillai* [1] is a decision exactly in point and is in my favour.

The appellant was not called upon in reply.

The Court expressed the following

OPINION:—We think that *Parry and Co.* v. *Appasami Pillai* [1], must be overruled. No authorities are cited in the judgment of the Appellate Court, but the learned Judge who decided the case on the original side referred on the point to *The General Steam Navigation Co* v. *Guillou* [2], and to *Schibsby* v. *Westenholz* [3]. The dicta in *The General Steam Navigation Co.* v. *Guillou* [2], on which the learned Judge relied were questioned in *Schibsby* v. *Westenholz* [3] which is rather against the view taken by him as in that case the question on which the Court of Queen's Bench decided to express no opinion was "as to the effect of the appearance of the defendant, where it is so far not voluntary that he only comes in to try and save some property in the hands of the foreign tribunal", rather implying that at any rate, where there was no property in the hands of the foreign tribunal appearance there would amount to submission. The later English Cases referred to in the Order of Reference and in *Veeraraghava Aiyar* v. *Muga Seit* [4] including the recent decision of the Court of Appeal in *Harris* v *Taylor* [5], as also *Harchand Panaji* v. *Gulabchand Kanji* [6] are clearly opposed to *Parry and Co.* v. *Appasami Pillai* [1] which must be overruled. That is sufficient to dispose of the reference, as the facts of the present case are identical.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice and Mr. Justice Seshagiri Aiyar.

The Secretary of State for India in Council represented by the Collector of Vizagapatam. *Appellant* * *(Defendant)*

v.

Maharajah Sri Maharajah Sahib Mahrbhan Dosthan Maharajah Sri Rao Sir Venkata Swetha Chalapatti Ranga Rao Bahadur Garu, K. C. I. E., Maharajah of Bobbili. *Respondent* *(Plaintiff.)*

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Madras Irrigation Cess Act, (Act VII of 1865)—Land Encroachment Act (Act III of 1905)—Government river, meaning of—Government not owner of banks or bed of river—Engagement—Inference of.

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* A. No. 113 of 1910 27th October 1915.

1. (1880) I. L. R. 2 M. 407.
2. (1843) 11 M. & W. 877, 894.
3. (1885) L. R. 6 Q. B 155, 162
4. (1914) 27 M. L. J. 535.
5. (1915) 2 K B. 580.
6. (1914) I. L. R, 39 B. 34,

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Where admittedly the Government did not own the banks or any part of the bed of the river until far below the point where the plaintiff's channel took off.

Held, that the river was not a river belonging to the Government so as to warrant the levy of water cess under Act VII of 1865.

Per Wallis, C. J.:—The balance of authority is against the extreme view taken by Miller and Munro, JJ., in *Mahalakshmi* v. *Secretary of State for India* 1 that the effect of Act III of 1905 was to vest all running water in the Government because there was no other owner Construing Act VII of 1865, this much is clear that at places where the whole bed of a river belongs to Government, it is a river belonging to Government and at places where no portion of the bed belongs to Government, it is not a river belonging to Government.

It was the clear intention of the legislature that the provisions of Act III of 1905 should be used in construing Act VII of 1865.

Per White, C. J. and Oldfield, J:—In the circumstances of the case, their Lordships refused to infer from the fact that the Government did not seek to levy a separate tax from 1865 to 1907, that there was when the Act (Act VII of 1865) came into force a subsisting engagement between the plaintiff and the Government within the meaning of the Act.

Per *White, C. J.*:—The engagement referred to in the Act is a subsisting engagement at the time that the Act came into force though acts or omissions since the Act might be evidence of such an engagement.

Appeal against the decree of the District Court of Vizagapatam in O. S. No. 2 of 1908.

The facts are sufficiently stated in the judgments.

The Government Pleader for the Appellant.

V. Ramesam and *B. N. Sarma* for the Respondent.

This appeal came on for hearing on 19th Dec. 1912.

The Court (Sir Arnold White, Chief Justice and Oldfield, J.) made the following

Order:—In the view the learned Judge took of this case it was not necessary for him to come to a finding upon the question raised in the second issue, whether the Suvarnamuki river belonged to Government. We cannot dispose of this appeal satisfactorily without a finding on that question. We accordingly send back the case to the District Judge and direct him to record a finding as to whether the Suvarnamuki river belongs to Government.

We also ask him findings on the following questions:—

(1) Whether the 160 acres in respect of which the Government claim the right to levy water cess were at the time of the Permanent Settlement taken into account as wet land for the purposes of the Settlement.

(2) Whether subsequently to the Permanent Settlement there has been an engagement with the Government under

1. (1910) I. L. R. 34 M. 295=20 M. L. J. 823.

which the plaintiff has become entitled to irrigation free of separate charge as regards these 160 acres.

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Fresh evidence may be adduced by either party. The findings will be returned within two months from the date of receipt of this order, and seven days will be allowed for filing objections to the finding.

[In compliance with the above order of this Court the District Judge of Vizagapatam submitted on the 1st issue that the suit lands were not taken into account at the time of the Permanent Settlement and on the second issue that "the engagement between plaintiff and Government is to be implied from the facts of the case that plaintiff is to be allowed to continue to take the water of the channel through the existing four sluices for the purpose of irrigating the suit area free of separate charge."]

[This appeal came on for hearing after the return of the finding of the Lower Court on the issues referred by this Court for trial.]

The Court (Sir Arnold White, C.J. and Oldfield, J.) delivered the following

Sir Arnold White, C. J

Judgments : —*Sir Arnold White, Chief Justice*:—The material facts for the purposes of this appeal are stated in the judgment of my learned brother which I have had the advantage of reading. I need not repeat them.

Before disposing of the appeal we thought it desirable to ask the District Judge for findings on two additional issues. They are in these terms:

(i) Whether the 160 acres in respect of which the Government claim the right to levy water cess were at the time of the Permanent Settlement taken into account as wet lands for the purposes of the Settlement; and

(ii) Whether subsequently to the Permanent Settlement there has been an engagement with the Government under which the plaintiff has become entitled to irrigation free of separate charge as regards these 160 acres?

The learned Judge gave the plaintiff a decree for the amounts paid under protest. He was of opinion that in 1833, when the Palakonda Zemindary was forfeited to Government, the title of Government was subject to any right already acquired.

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On the 2nd additional issue the learned Judge finds: "It is evident from Exhibit C that from some time prior to 1814 the village of Narainapuram was getting a supply from the channel through 5 punathas (sluices). The Palakonda Zemindar had constructed the channel and was then the owner of it. The Palakonda Zemindari was forfeited to Government in 1833. The estate was managed by the Collector till 1846, when it was leased to Messrs. Arbuthnot and Co. till 1892. After that the estate was again taken under Government management (District Gazetteer page 280). No charge or water cess was made for the whole period from 1833 to 1907. The plaintiff has now four sluices and the Exhibits E series and II show that plaintiff was allowed to erect masonry sluices at his own cost in accordance with the Executive Engineers' recommendations based upon old records. A grant or agreement as between the Palakonda Zemindar and the plaintiff's predecessor is clearly to be inferred from Exhibit C and I think the Government must be taken to have succeeded to the Palakonda Zemindar's rights in the channel in 1833 subject to the plaintiff's right. I would therefore hold that subsequent to the Permanent Settlement there was an implied engagement by Government to supply the plaintiff with water from the channel as before the forfeiture of the Palakonda Zemindari. I am therefore of opinion that an engagement between plaintiff and the Government is to be implied from the facts of the case that plaintiff is to be allowed to continue to take the water of the channel through the existing four sluices for the purpose of irrigating the suit area free of separate charge."

It seems to me that the right of Government with reference to the levying of a separate tax for the use of the water which irrigates these lands is independent of the question whether Government, as standing in the shoes of the Palakonda Zemindar, are under any obligation to supply water for the lands in question, and depends upon the construction of Act VII of 1865. This Act conferred on, or recognised in Government a right to levy a separate tax for water. Under the Act the only limitation to the right to levy the tax, if the conditions of S. 1 are satisfied is to be found in the proviso—this is an engagement with Government by virtue of which the land-holder is entitled to irrigation free of separate charge. If there is an 'engagement' no tax can be imposed for the use of water to the extent covered by the engagement. It seems to me that, if the case comes within the 4

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corners of the Act, Government in its capacity of tax-gatherer can levy the separate tax. Assuming that Government are under an obligation to continue to supply water for the irrigation of these particular lands by reason of the fact that the Palakonda Zemindar was under this obligation when his lands were forfeited to Government, it does not follow that Government are not entitled to levy a tax for the use of the water. This question must depend on whether there has been an engagement within the meaning of the Act.

The engagement in my opinion must be a subsisting engagement when the Act came into force, but acts or omissions since the Act may be evidence of such an engagement.

In my opinion it must be an engagement express or implied, with Government. I am not prepared to infer from the fact that Government did not seek to levy a separate tax from 1865 to 1907 that there was, when the Act came into operation, a subsisting engagement between the plaintiff and Government within the meaning of the Act.

I am unable to accept the finding of the District Judge that subsequently to the Permanent Settlement there has been an engagement.

I now pass to the finding on the 1st additional issue. This issue raises the question whether there was an engagement at the time of the Permanent Settlement. The finding of the learned Judge is in the negative. I have had some doubt as to whether this finding is right. If it is proved that the whole or any portion of these 160 acres were taken into account when the Permanent Settlement was made, this, in my opinion, would constitute an engagement at the time of the settlement within the meaning of the Act. It is, however, for the plaintiff to establish this. One cannot expect the evidence as to what happened in 1802 to be of a very precise and circumstantial character. Although it is now admitted that the channel was constructed before the date of the Permanent Settlement, I do not think that Government were aware of this fact when they first imposed the tax in 1907. In a report dated 7th March 1907 (Exhibit X) the Deputy Tahsildar wrote: "It is presumable that the channel did not exist at the time of the Permanent Settlement but it was dug some time between 1801 and 1824 unless the Zemindar could show anything to the contrary". It is of course possible that Government would

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not have imposed this separate tax 30 years after the Act came into operation if they had been aware that the channel was in existence at the time of the Permanent Settlement. I feel there is force in the contention that as the channel was in existence on the date of the Permanent Settlement in 1802 and as the lands in question were in fact irrigated as wet lands in 1814 (and this appears to be established by Exhibit C) it is a legitimate inference, as a matter of evidence that these lands were at the time of the Permanent Settlement taken into accounts as wet land for the purposes of the Settlement. On the other hand we have the fact that the Permanent Settlement account (Exhibit I) does not mention the channel as a source of Irrigation. On the whole I am not prepared to differ from the conclusion of fact at which the District Judge and my learned brother have arrived, that these lands were not taken into account, as wet lands for the purposes of the Settlement.

Oldfield, J.

Oldfield, J. :—In this case plaintiff-respondent sued for a refund of water tax collected from him by Government, the defendant-appellant for fasli 1317 and for a declaration that the cultivation in question was entitled to free irrigation in future. The Lower Court decreed in his favour and has found on remand that "an engagement between plaintiff and Government is to be implied from the facts of the case, that plaintiff is to be allowed to continue to take the water through the existing four sluices for the purpose of irrigating the suit area free of a separate charge." This finding was reached on the second of the two additional issues remanded "whether subsequently to the Permanent Settlement there has been engagement with Government, under which plaintiff has become entitled to irrigate free of charge as regards these 160 acres?"

The material facts on this part of the case are that the suit land is part of Narainapuram village in the plaintiff's Zemindari of Bobbili and is irrigated by the Sakherpalli channel. The pleadings in this case are not clear as to whether this channel was constructed before or after the Permanent Settlement in 1802 and in fact they indicate that they were drafted on both sides under the impression that it was constructed after it. But the Lower Court refers to the channel as constructed between 1690 and 1780 on the strength of evidence in a connected suit; Exhibit III (a) indicates a date before 1801 and the learned Government Pleader

is not prepared to contest the point. The channel was constructed by the Palakonda Zemindar to irrigate Palakonda land. But Bobbili land was utilised for its course so far as it was adjacent to the suit 160 acres. Subsequently in 1833 the Palakonda Zemindari was forfeited to Government. In 1907 Government discovered that there were about 1,200 acres irrigated out of an actual area of about 4,250 acres in the whole village, although in the Permanent Settlement only 428 acres had been treated as irrigated out of a total of about 950 acres for the purpose of estimating the assets, on which the peishkush had been calculated. The charge now in dispute was accordingly levied on the 160 acres irrigated by the channel on the assumption, the grounds for which will be discussed, that this area came under irrigation at a later date. The contention under consideration on which the Lower Court has found in plaintiff's favour is that it is exempt from charge in virtue of an engagement between Government and the Zemindar, such as is contemplated in S. 1 (*b*), Act VII of 1865. It held that such an engagement arose by implication at some time between the Permanent Settlement and the forfeiture.

This engagement is referred to in the plaint, if at all as "the understanding and agreement between plaintiff's predecessor in title and the Palakonda Zemindar and latterly between plaintiff's predecessors in title and the plaintiff on the one hand and the Government on the other." The Lower Court's finding on remand is that "a grant or agreement is clearly to be inferred from Exhibit C and that Government must be held to have succeeded to the Palakonda Zemindari rights in the channel subject to plaintiff's right" and therefore that "an engagement between plaintiff and Government is to be implied from the facts of the case that the plaintiff is to be allowed to continue to take water of the channel for the purpose of irrigating the existing suit land free of separate charge."

This finding involves,

(1) that there was a grant or agreement as between Palakonda and plaintiff,

(2) that Government succeeded to the former's obligation. The learned District Judge relied on Exhibit C as establishing the first point. But Exhibit C is only an order by the Zemindar of Palakonda in 1840 to one Tammanna to have the channel repaired, to see to the irrigation under it and to pay himself and his assistants

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for doing so out of grain and money to be collected from villages under it not including Narainapuram, the suit village. There is nothing regarding the liability to or exemption from water charge of any village; and this document therefore contains nothing either supporting or contradicting the plaintiff's case that Palakonda ever granted free irrigation to his land or undertook to provide it. It could moreover show at most that Palakonda undertook to provide irrigation under the channel, not whether that irrigation should be free or charged for by Government. Another portion of the evidence has also been referred to, though the Lower Court does not deal with it in this connection, that regarding the conditions on which land for the course of the channel was originally obtained. In paragraph 7 of the original judgment, Exhibits III and IV are relied on as showing that the land was not given by the Zemindar, plaintiff's predecessor, but by certain Inamdars, and that, as they received compensation for it in the shape of land in Palakonda, there is no reason for supposing that the Zemindar received compensation (as plaintiff contends) in the shape of free supply of water. Plaintiff's answer to this is that other land besides that referred to in Exhibits III and IV was taken for the channel, part of which, as the references to the character of the holdings adjacent to it in the evidence of the 14th and perhaps the 8th plaintiff's witnesses show, was probably jiroyati and therefore the property of the Zemindar and the learned Government Pleader does not dispute the fact. But, if some land taken was the Zemindar's, that goes very little way towards proof that he received compensation for it in the manner alleged. There would be nothing improbable in his giving up the small extent in question (the whole channel apparently occupies only about 2 acres in Narainapuram) for nothing as an act of courtesy to a neighbour. Speculation as to promises made and the balance of advantage contemplated over a hundred years back must be fruitless. Only one observation is justified. There is no reason for supposing and it cannot be assumed, that at the remote day in question the right of Palakonda or any ultimate right of Government to charge for water was present to the minds of those concerned or was provided for in any agreement between them.

Next, even if any grant or undertaking regarding free irrigation by Palakonda had been established, it would still be

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impossible to follow the Lower Court in the next step in its arguments and infer the engagement between Government and plaintiff from the former's succession to the obligations of the latter. This inference is of course independent of the argument based on the general rights and liabilities of Government, to which I shall return. It must be founded solely on the fact that in 1833 Government re-entered on the Palakonda Zemindari on its forfeiture for rebellion (Vizagapatam District Gazetteer Volume 1 page 178) and this is insufficient in the absence of anything to show how the Zemindar's grant or contract could be valid beyond his tenure of the estate or that of his heirs or transferees and after the legal determination of the tenure against the authority, Government, which created it. On the assumption that plaintiff's predecessor gave his land in consideration of a promise by Palakonda, plaintiff may be entitled to relief on equitable grounds, because that consideration has failed. But his present suit is not framed in that way, nor has it been shown that the relief, which could be decreed in such a suit, would be that now asked for. In these circumstances the finding on the second additional issue remanded cannot be accepted.

The appeal is argued next on the ground that the 160 acres charged for were taken into account as wet land for the purposes of the Permanent Settlement and that therefore an engagement has been established between plaintiff's predecessor and Government within the meaning of S. 1 (b) Act VII of 1865. The Lower Court held the contrary on the first additional issue remanded.

The plaintiff's pleading consisted in an averment in the plaint paragraph 7 that the land was " wet even prior to the Permanent Settlement and also prior to the construction of the channel" and in paragraph 9 that the extent mentioned as wet in the Permanent Settlement accounts was only a rough estimate. It therefore amounted to a claim that all land, actually wet at the date of settlement must be treated as having been included as such in it, whether it can be identified in the accounts or not. Government denied that this land was wet at the date of settlement and contended that the accounts were final. The first point was dealt with under original issue 8 and the first additional issue on remand; the second under the original issue 7.

The Lower Court's conclusion on the question whether the 160 acres were wet at the date of the settlement is contained in

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paragraph 16 of its original Judgment and paragraphs 9 to 12 of its finding. Plaintiff it will be seen has supported his case in two forms, that the land was irrigated at the time of settlement (1) by the channel or (2) by the surplus from tanks to the north on the flow of the *Desuru* or surface water from that direction, the construction or existence of the channel conferring no additional advantage. It is important that the burden of proof of both alternatives is on him. He has attempted to discharge it as regards the first by no sort of direct evidence and only by the argument that the land can be and is being irrigated by the channel and that it therefore could have been, and was irrigated by it continuously from its contruction and therefore must have been, when the settlement took place. As regards the second there is only oral evidence. and I agree with the Lower Court that the assertions of the witnesses called, persons of no particular competence or credit, are not sufficient to prove that the water from the north ever was or could have been an adequate supply.

As regards the first of these alternatives the lower Court has referred to a presumption as arising from the present irrigation by the channel and its existence before the settlement. But, if it meant more than that these facts must have such weight as the circumstances give them, I cannot follow it in its conclusion or its application of authorities to support it. The argument from the existence of a particular state of things at two dates to its continuous existence between them must in this as in other cases, depend on the circumstances and it will be found here that they render it improbable. As regards this improbability and also plaintiff's second alternative case the nature of the evidence he relied on and his failure to adduce direct documentary evidence are important, the latter greatly impairing the strength of his arguments. It was the duty of the plaintiff and his predecessors under S. 6. Act XXIX of 1802 to appoint *Karnams*, who under S. 11 should have kept registers of lands and accounts of their produce which should have been available to show whether the 160 acres in question were irrigated and from what source; and the absence of evidence of this kind is of the greatest significance. It is not merely that there is nothing regarding the remoter years before or shortly after the settlement, though even as regard those years, something as old as, for instance, Exhibit C might be expected. For it would be natural that registers such as those

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referred to in S. 11 (1) and (2) should be preserved as permanent records. But there is in fact evidence that some old accounts were in existence recently and have been withheld. The evidence of 11th plaintiff's witness, plaintiff's Record-keeper, indicates that this is so. Second plaintiff's witness, his deputy surveyor, attempted to give secondary evidence of the contents of a Gudi-khat account for 1838, which he had seen the year before the trial; and mentioned the existence of a *nila Jabitas* showing the land cultivated by and the amount due from each ryot as available for the last fifty years and accounts relating to the 160 acres for the last twenty years, though he said he could not remember whether there were accounts showing the wet cultivation of the village. Even accounts of this age would have been important, because they would have afforded assistance on two points (1) the extent to which irrigation under the channel has actually been continuous in the past; (2) the allocation of particular sources of supply to particular lands. The latter would have been particularly material in connection with plaintiff's second alternative contention and the Lower Court's argument from the increase in the number of tanks in paragraph 7 of its judgment and paragraph 11 of its finding.

Before turning to the affirmative portion of the evidence for Government I refer shortly to other facts relevant to the inferences regarding the continuity of the channel irrigation and the alleged improbability of Government's having failed to charge for so long, if a charge had been leviable. As regards the first point it is worth noticing that the only early documentary reference to the channel, which are in evidence, those in Exhibits A, B and C, show that in fact in 1865, 1869 and 1814 it was in bad repair and was affording defective supply. The only description of it available, that contained in the report of the Assistant Engineer in 1879, Exhibit VIII, is entirely consistent with the oral evidence at the trial. It shows that the channel is badly situated, required construction of a temporary headwork each year and was liable to damage from river floods and storm water. Its private ownership afforded no security for its efficient maintenance. In the circumstances there is nothing unlikely in its having been out of use from time to time or at the date of the settlement, as the evidence to be referred indicates that it was. And there is no special likelihood that Government had occasion to consider whether the right to charge existed, since the assumption that all

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sources had been taken into account at the settlement would be natural. It is material that Government had direct control of Palakonda and of this channel only from 1833 till 1847 when the estate was leased to Arbuthnot and Co. and from 1892, when the lease was terminated. The former period was before Act VII of 1865, when the right to charge for water was at least doubtful; and it is not shown that anything occurred during the latter, which made enquiry necessary. The circumstances in which the defendant's 1st witness was appointed Special Deputy Tahsildar in connection with Narainapuram water cess in 1906 and made his report Exhibit X on which the charge was imposed, are not in evidence.

In these circumstances the affirmative probability that irrigation from the channel was continuous or was going on at the time of the settlement is not in my opinion strong; and I think that it is displaced by the evidence to be considered. Exhibit I is dated 1801, the year before the settlement and is headed "Hakikhat of Narainapuram Village." A *Hakikhat* is defined in Wilson's Glossary as a statement or account. Exhibit I is signed by the Zemindars, *Kulkarnies* or *Karnams* and gives the extent of *jiroyati* and inam land in the village, details of the latter and then the extent of various kinds of *Porambokes* including tanks. Lower down there is again a heading "tanks" followed by an enumeration of them under sub-headings, *jiroyati* and *inam* large and small. But there is no reference to any channel and the absence of any is directly opposed to the plaintiff's case. It is no doubt true, that (as he points out) the extents in Exhibit I are stated most inaccurately and that much information is omitted. But that is not, in my opinion, sufficient to explain the failure to refer to the 2 acres occupied by the channel as *poramboke*, if it was really being maintained as such, when the figures show that smaller extents must have been taken into account; and it is difficult to see the use of the separate enumeration of tanks, unless as a list of irrigation sources. Reference has already been made to the facts that Exhibit I gives about 400 acres as irrigated by 14 tanks, out of a total extent of 950 acres; and that there are now 1,200 acres irrigated by 48 tanks and the channel out of 4,250 acres. The difference in the total extent may be explained on the ground that only land under actual cultivation was brought to account. But no

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similar explanation is available regarding the extent of wet land, to which attention would naturally be paid. There is therefore foundation for the argument that the increase in it is due to the presence of additional sources of irrigation, besides those mentioned in Exhibit I and including the channel. This argument plaintiff could have rebutted by producing accounts, showing the extent under each source and thus proving that the increase is covered by the extent under the new tanks. This he has not attempted, though (as shown) in the circumstances, the inference proposed by him from the existence of the channel before or after the settlement must be held displaced by the evidence that it afforded no irrigation at its date. As the suit 160 acres are not proved to have been irrigated then, either under the channel or the water from the north, the Lower Court's finding that they were not wet at the settlement must be sustained.

This conclusion reached, I need not deal with the argument based on the contrary assumption, that, even if the 160 acres had been proved to have been wet at the settlement, plaintiff's failure to identify them as part of the area shown as wet in the accounts would be immaterial, because an engagement under S. 1 (*b*) Act VII of 1865 would be inferred from the circumstances. I therefore concur in the finding of the learned Chief Justice regarding this portion of the case.

[The appeal came on for final hearing before the Chief Justice and Seshagiri Aiyar, J.]

J. L. Rosario for the Government Pleader.

B. N. Sarma for the Respondent.

The Court delivered the following

The Chief Justice.

Judgments:—*The Chief Justice.*—This appeal was heard in the first instance by Sir Arnold White, Chief Justice, and Mr. Justice Oldfield and after certain questions had been decided, the further hearing was adjourned to await the decision of the Letters Patent Appeal No. 39 of 1913 * from the decree in A. S. No. 124 of 1906 † in which owing to a difference of opinion between Miller and Sankaran Nair, JJ., the learned Judges who heard the appeal, the decree of the Lower Court was confirmed in accordance with the opinion of Sankaran Nair, J. His decision has since been reversed by Oldfield and Bakewell, JJ., *dissentiente* Sadasiva Aiyar, J., and the present appeal has now come before this Bench for further argument and disposal.

* 29 M. L. J. 389. † (1913) I. L. R 37 M. 325=24 M. L. J. 305.

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The Chief Justice.

The important and difficult questions in these appeals as to which there has been much difference of opinion, relate to the effect and construction of the Madras Water Cess Act, VII of 1865 as amended and of the Madras Land Encroachments Act, III of 1905 and have nothing to do with any right of Government to control the distribution of water for irrigation, as to which see the saving in the Easements Act and the decision in *Fischer* v. *The Secretary of State for India* [1] with regard to the right of Government to charge separately for the supply of water the history of the question has been elaborately considered by Sankaran Nair, J. in *The Secretary of State for India* v. *Janakiramayya* [2] but the restrictive construction based upon this history which he placed upon the Act had not been accepted by any of the learned Judge's in the Letters Patent Appeal and it is unnecessary for me to refer to it. What seems to me perfectly clear from the terms of the Act itself is that it authorised the levy of statutory water cess on cultivation effected by means of water taken from a river belonging to Government subject to an exception in favour of Zemindars, etc., to the extent to which by virtue of their engagements with Government they were entitled to irrigation free of separate charge. The question whether the plaintiff in this case is entitled to exemption by virtue of an engagement with Government has been dealt with by the learned Judges in the judgments they have already pronounced, and I therefore refrain from discussing it and confine myself to the question whether, assuming there is no such engagement, Government are entitled to levy water cess by virtue of the fact that the river from which this irrigation channel takes off is a river belonging to Government within the meaning of the Act. Unfortunately the Act contains no definition as to what is a river belonging to Government. Where both banks belong to Government it is hardly disputed that, as Government owns the bed, the river at such places may be treated as belonging to Government. What however if one bank belongs to Government and the other to a Zemindar as in the case which gave rise to the Letters Patent Appeal No. 39 of 1915? It cannot be said there was any judicial decision on this point before the passing of Act III of 1905. Though the immediate object of that Act was to provide a method of dealing with encroachments on land belonging to Government and the immediate occasion of passing it was the

1. (1908) I.L. R. 32 M. 141. 2. (1913) I.L.R. 37 M. 345.

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decision in *Madathapu Ramayya* v. *The Secretary of State for India* [1] as to Penal Assessment, it does not in my opinion admit of doubt, having regard to the language and history of the measure that those responsible for it intended the declaratory clause to deal with running as well as standing water and to remove doubts which might exist as to the extent of the rights of Government over such water. The language of S. 1 was copied from the Bombay Act V of 1879 which, after in these terms declaring the ownership of Government among other things in standing and flowing waters, proceeded in S. 55 to authorise Government to fix rates for water the right to which vests in Government. It was probably considered that there was no necessity to insert a clause of that kind in the Madras Act because under Act VII of 1865 Government already had power to impose water cess for water taken from a river belonging to Government, and it was thought sufficient to declare that running water belonged to Government. The saving clauses of the section in the Madras Act are not the same as the saving clauses in the Bombay section but more elaborate, and the new saving in favour of natural rights appears to have special reference to natural rights to the use of flowing water as defined in the illustrations to S. 7 of the Easements Act closely following the English law. I am therefore unable to agree with Sankaran Nair, J. that we are entitled to disregard the provisions of Act III of 1905 in construing Act VII of 1865. On the contrary I think the Legislature clearly intended that the declaratory section should be used in the interpretation of the words "rivers belonging to Government" in Act VII of 1865, and in any case I should feel bound to follow the unanimous decision on this point of the Full Bench in *Secretary of State for India* v. *Janakiramayya* [2], until it is reversed by higher authority. I may further mention that in 1905 the subject of the extension of irrigation and the terms on which it could be undertaken were engaging attention. 1903 was the year of the Irrigation Commission and of the Peranai Dam suit, the appeal in which was decided in 1905 and the Irrigation Bill to enable the execution of general projects which was subsequently introduced was then under consideration, and at the same time Government was asserting its claim to levy water cess in such a way as to give rise to all those more or less connected suits. In these circum-

1 (1903) I. L. R 27 M p. 386. 2. (1915) 29 M. L. J 389.

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stances I can see no reason for refusing to give full effect to the statutory declaration the Act contains as to Government ownership of running water not the property of anybody else, or for refusing to construe Act VII of 1865 which had left it doubtful what was meant by a river belonging to Government in the light of the provisions as the Courts at once proceeded to do. In *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India* [1] Miller and Munro, JJ. held that the effect of Act III of 1905 was to declare that all rivers are the property of Government, running water not being the property of anybody else, and Oldfield, J. would appear to have accepted this view in the Letters Patent Appeal. But in *Venkataratnam ..a* v. *Secretary of State for India* [2], Benson and Sundara Aiyar, JJ., as I read the judgment held, applying the provision of Act III of 1905, that as the channel in that case belonged to the Inamdar the running water in it also belonged to him and not to Government and that there was no case for levying water cess under the Act of 1865. Sankaran Nair, J. has given his reasons at great length for putting this construction on Act III of 1905, and Sadasiva Aiyar, J. has agreed with him in the Letters Patent Appeal. So too Bakewell, J. observed as to the words "river belonging to Government" in Act VII of 1865, that the English authorities showed that the owner of the river bed has a qualified ownership in the stream of water which flows over it by virtue of which the river and the stream may be said to belong to him a proposition which was supported in the argument before us by reference to the language of James, L. J. in *Bush* v. *Trowbridge Water Works Company* [3] and to *Lyon* v. *Fishmonger's Company* [4]. He was however apparently of opinion that where only one bank and the bed *ad-medium filum acquae* belonged to the Zemindar the river must be treated as belonging to Government by virtue of Act III of 1905. In the present case however both banks and the whole bed at the place in question belong to the Zemindar and not to Government and therefore on this view as I understand it the river is not the property of Government. The balance of authority appears to me to be against the extreme view taken by Miller and Munro, JJ. in *Kandukuru Mahalakshmamma Garu* v. *The Secretray of State for India in Council* [1] that the effect of Act III of 1905 was to vest all running water in the Presidency

1 (1910) I. L. R. 34 M. 296. 2 (1913) I. L. R. 37 M. 364.
3. (1875) 10 Ch. App. 459, 462. 4. (1876) 1 A. C. 662, 673.

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in Government on the ground that there was no other owner. Construing Act VII of 1865, I think this much is clear that at places where the whole bed belonged to Government it was a river belonging to Government, and at places where none of the bed belonged to Government as here, it was not a river belonging to Government. If this part of the river belonged to the Zemindar before the passing of Act III of 1905, his ownership is preserved by the saving clause of the section and is unaffected by it. Admittedly Government does not own the banks or any part of the bed of this river until far below the point where the channel in question takes off. It cannot therefore be considered a river belonging to Government so as to warrant the levy of water cess under Act VII of 1865. This is the only question which has been argued before this Bench and I confine myslf to it. The result is that the appeal must be dismissed with costs.

Seshagiri Aiyar, J:—I agree. If the ancient doctrine that flowing water is *publici Juris* is to be abandoned, proprietorship over it can only be based on the right to the bed and banks of the stream through which it runs. This was recognized by Lord Justice James in *Bush* v. *Trowbridge Water Works Co.* [1] and by the Lord Chancellor in *Lyon* v. *Fishmongers' Company* [2]. Lord Blackburn in *Orr Ewing* v. *Colquhoun* [3] stated that: "The Lord Advocate admitted that he understood the law of *Scotland* to be that if the same person is proprietor of the ground on both sides of a river, in which there is no right of navigation, he can change its channel as he pleases, provided he restores it to its old channel before it leaves his ground". On this principle, the Government who owned neither the bed nor banks of the river in question up to the point where the diversion took place can lay no claim to the water. It was argued that the view will be inconsistent with Act III of 1905. If that Act is only declaratory of existing rights, the declaration would cover not only the substantive proposition enunciated in Section 2 Clause (1) but also that contained in the saving clause (*a*). As no question of either part ownership of the banks or of the water belonging to Government being mixed up with water belonging to the respondent arises, no rights under Act VII of 1865 arose. I agree that the appeal should be dismissed with costs.

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1. (1875) 10 Ch. App. 459, 462. 2. (1876) 1 A. C. 662, 673. 3. (1877) 2 A. C. 839.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Rama Aiyar *alias* Ramasami Aiyar ... *Appellant* * (*Plaintiff*)

v.

Govinda Pillai (died) and others ... *Respondents* (*Defendants L. R.*)

Ramasami Aiyar *v.* Govinda Pillai.

Tort—Malicious procuring of order for attachment before judgment—Attachment not effected, plaintiff furnishing security—No right of action.

In a suit for damages for maliciously and without reasonable cause procuring an order for attachment before judgment of the plaintiff's movables, no attachment in fact having taken place as he furnished security.

Held, that the plaintiff had no cause of action.

Second Appeal against the decree of the District Court of Tanjore in A. S. No. 893 of 1913, preferred against the decree of the Court of the District Munsif of Tiruvalur in O. S. No. 256 of 1912.

[The facts are sufficiently stated in the judgment.]

T. V. Gopalaswami Mudaliar for the Appellant.

[Their Lordships, accepting the finding of fact by the District Judge, *viz.*, that there was no seizure of property in pursuance of the order of attachment, desired the vakil for the appellant to argue the rest of the case.]

Even on the finding of the Lower Court, the plaintiff is entitled to damages. The affidavit in support of the application for attachment before judgment as well as the order of attachment, constitute an injury to the credit and reputation of the plaintiff. *Kumarasamia Pillai* v. *Udayar Nadan* [1], *Nanjappa Chettiar* v. *Ganapathi Gounden* [2].

Sadasiva Aiyar, J.:—(After looking into the original records). In *Kumarasamia Pillai* v. *Udayar Nadan* [1], there was an attachment effected by actual seizure.

Napier, J.:—Does the mere obtaining of an order of attachment, without more, give you a cause of action?

Yes. See *Quartz Hill Gold Mining Co.* v. *Eyre* [3].

Napier, J.:—The observations of *Bowen, L. J.*, are against you. The rule is that the bringing of an ordinary civil action however maliciously and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution.

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* S. A. No. 1399 of 1914. 30th November 1915.

1. (1909) I. L. R. 32 M. 170.
2. (1911) I. L. R. 35 M. 598, s. c. 21 M. L. J. 1052.
3. (1883) 11 Q. B. D. 674.

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But *Bowen, L. J.*, takes care to state the exceptions to the rule *e. g.*, proceedings in bankruptcy against a trader or the analogous process of a petition to wind up a company.

Sadasiva Aiyar, J. :—In *Quartz Hill Gold Mining Co.* v. *Eyre* [1], there was publication in the *London Gazette* and consequently damage to the credit and reputation of the company.

Publication is a question of degree. Here there was publication to the attaching officer. Reference was made to *Doyle* v. *Dwarkanath Chatterjea* [2], *Chunder Kant Mookerjee* v. *Ram Coomar Coondo* [3], *Clissold* v. *Cratchley* [4], Addison on Torts 8th Edn. p. 29.

G. S. Ramachandra Iyer for the Respondent.

Napier, J. Assuming that a suit for damages for maliciously bringing a civil action does not lie, is there any reason for applying the same rule to extraordinary mesne processes taken out in the course of an action.

There is a distinction between the present case and a case of malicious prosecution. In the latter case, the prosecution is an original proceeding whether by way of a complaint, or a petition in bankruptcy or otherwise. In the case of interlocutory proceedings, like attachment before judgment, there must be legal damage (*i.e.*,) trespass to property, interference with the liberty of the person, etc., in order to give a cause of action. The obtaining of an order of attachment, without more, is on the same footing as the institution of an ordinary civil action. In both cases there is no cause of action for a separate suit for damages. See *Quartz Hill Gold Mining Co.* v. *Eyre* [1]. If, however, a litigant executes any form of legal process which is invalid for want of jurisdiction, irregularity or any other reason and in so doing commits any act in the nature of trespass to person or property, he is liable; otherwise, not. *Clissold* v. *Cratchley* [4]. *The Walter D. Wallet* [5]. *Bishun Singh* v. *A. W. N. Wyatt* [6].

[*Sadasiva Aiyar J.* referred to *Cotterell* v. *Jones* [8].] The rule laid down by *Bowen, L. J.* in *Quartz Hill Gold Mining Co.* v. *Eyre* [1], has been followed in *Wiffen* v. *Bailey, etc., Union* [8]. *Mohini Mohan Misser* v. *Surendra Narayan Singh* [9], takes away a right of suit in a case like this. Reference was also made to *Berry* v. *Adamson* [10].

1. (1883) 11 Q. B. D. 674.
2. (1867) 8 W. R 88.
3. (1874) 22 W. R. 138.
4. (1910) 2 K. B 244, 249.
5. (1893) P. 202.
6. (1911) 14 C L. J. 515, 520.
7. (1851) 11 C. B. 713.
8. (1915) L. R. 1 K. B. 600.
9. (1914) I. L. R. 42 C. 550.
10. (1827) 6 B. & Cr. 528.

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Sadasiva Aiyar, J:—Is there no remedy for a malicious abuse of process ?

The present is not a case coming within the category of wrongs known as malicious abuse of civil process. In the latter case, the wrong consists not in maliciously putting the process in force, but in maliciously abusing it with an ulterior purpose, which was not the object of the process. *Grainger* v. *Hill* [1]. Proceedings in bankruptcy and a petition to wind up a Company are more in the nature of criminal proceedings and come under the head of malicious prosecution. See Pollock on Torts p. 326. In the present case, I submit, there is no cause of action. S. 95 of the C. P. Code and Art. 29 of the Limitation Act contemplate an actual seizure of goods and not merely the obtaining of an order. For all these reasons the plaintiff's suit is unsustainable.

T. V. Gopalaswami Mudaliar replied.

The Court delivered the following

Napier, J.

Judgment:—*Napier, J.*—This is an appeal from the Judgment of the District Judge of Tanjore, on Appeal from the Judgment of the District Munsif of Tiruvalur in a suit in which the plaintiff claimed damages from the defendant in respect of his action in applying for attachment before judgment and coming to attach his movables. The District Munsif gave judgment for the plaintiff, while the District Judge holding that there was in fact no attachment dismissed the suit on the ground that the taking out of notice gave no cause of action. It has been argued before us that this view is incorrect and that as the District Judge has found that there was no reasonable and proper cause for obtaining an order for attachment and that it was obtained maliciously, the plaintiff is entitled to recover damages in respect of that order. Great reliance has been placed on the decision of this Court in *Nanjappa Chettiar* v. *Ganapathi Gowndan* [2]. That was, however, a case where the attachment had been made and is of no assistance to us in this question. It was argued that the procuring of the order was an abuse of the process of court and alternatively that, however it may be termed, a suit lies where the application is malicious and without reasonable or probable cause. The first point may be shortly disposed of. Abuse of the process of Court does not mean an improper procuring of the process of Court but the

1. (1838) 4 Bing. N. C. 212. 2. (1911) I. L. R. 35 M. 598.

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applying of the process of Court in an improper manner and for improper purposes. The nature of this suit is clearly pointed out in *Grainger* v. *Hill* [1]. There, the defendants, being desirous to possess themselves of a ship's register, sued out a *capias* indorsed for bail in a certain sum and sent two Sheriff's officers with the writ to the plaintiff who was lying ill in bed. The defendant accompanied the Sheriff's officers and told the plaintiff that they had not really come to take him but to get the ship's register; but that if he did not hand over the ship's register or find bail, they must take him. The plaintiff, being unable to procure bail and being much alarmed, gave up the register. The Court held that this was an abuse of the process of Court. Bosanquet, J., puts the matter thus: "This is not an action for malicious arrest or prosecution, or for maliciously doing that which the law allows to be done: The process was *enforced* for an ulterior purpose, to obtain property by duress to which the defendants had no right. The action is not for maliciously putting process in force, but for maliciously abusing the process of Court." And Tindal, C. J. says, "the complaint of the plaintiff is that the process of the law has been abused, to effect an object not within the scope of the process."

The other point is much more difficult. But a careful examination of the Judgment in *Quartz Hill Gold Mining Company* v. *Eyre* [2], leads to the conclusion that the suit will not lie. The allegation is one of malicious civil prosecution and the circumstances under which such a suit will lie are exhaustively considered by the Court of Appeal in that case. The decision was that an action will lie for falsely and maliciously and without reasonable or probable cause presenting a petition under the Companies Acts to wind up a trading company even though no pecuniary loss or special damages be proved, for the presentation of the petition is from its very nature calculated to injure the credit of the company. Lord Justice Bowen in that case starts with this proposition that the bringing of an action although falsely and maliciously and without reasonable or probable cause will not support an action by the person so sued. The proposition to my mind disposes of the case for reasons which will appear later. He adopts the doctrine of Holt, C. J., in *Savile* v. *Roberts* [3]. There are three sorts of

1. (1838) 4 Bing. N. C. 212. 2. (1883) 11 Q. B. D. 674.
3. (1698) Lord Raymond's Reports 374.

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damage any one of which would be sufficient to support an action for malicious prosecution. Damage to a man's fame, damage to a man's person and damage to a man's property in that he is forced to expend his money in acquitting himself of the crime of which he is accused. The learned Lord Justice then goes on to point out that although an action does not give rise to an action for malicious prosecution, inasmuch as it does not necessarily or naturally involve damage, there are certain legal proceedings which do necessarily and naturally involve damage, and therefore do found an action, and he places under this head all ordinary indictments for ordinary offences. He then proceeds to consider what other proceedings necessarily involve damages and agrees with the decision in *Johnson* v. *Emerson* [1], that the false and malicious presentation without reasonable and probable cause of a bankruptcy petition against a trader gave rise to an action for malicious prosecution. He then proceeds to consider the question arising in the suit whether a petition to wind up a company maliciously and wrongfully brought does necessarily involve damage just as in the case of a bankruptcy petition, or does not, in which latter case it would not justify an action for malicious prosecution. He then proceeds to consider the question arising in the suit whether a petition to wind up a company maliciously and wrongfully brought does necessarily involve damage just as in the case of a bankruptcy petition, or does not in which latter case it would not justify an action for malicious prosecution. He then states that as a petition to wind up a company cannot be presented without being advertised in the newspapers, it necessarily follows that the petition must strike a blow at the credit of the company and thereby necessarily involve damage and decides that the action will lie for the reason that special damage is involved in the very institution of the proceedings. Brett, M. R., gave judgment to the same effect. This has invariably been followed and has lately been reaffirmed by the Court of Appeal. In *Wiffen* v. *Bailey and Ramford Urban District Council* [2]. Lord Justice Buckley says "But as was pointed out by Lord Justice Bowen in *Quartz Hill Gold Mining Co.* v. *Eyre* [3], it is in very few cases that an action for malicious prosecution will lie where the matter is one of civil proceedings. And the Court held that

1. (1871) L. R. 6 Ex. C. 329. 2. (1915) 1 K. B. 600.
3. (1883) 11 Q. B. D. 674.

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a complaint under the Public Health Act requiring a householder to abate a nuisance by stripping the paper off the walls, etc., was not a proceeding necessarily and naturally involving damage, and therefore a suit for damages for malicious prosecution did not lie. Reliance is placed on the decision of the Court of Appeal in *Clissold* v. *Cratchley* 1. But there the Court based its Judgment on the fact that the allegations supported an action for trespass in that the Sheriff's officer levied an exaction on the plaintiff's goods at his farm. Thecase in *Quartz Hill Gold Mining Co.*, v. *Eyre* 2, was never referred to and it is clear that no observation in this judgment could have been intended to throw doubt on the earlier decision. In this view of the law how will this action lie ? The bringing of this original action thus gives no cause of action however malicious, *vide Mohini Mohan Misser* v. *Surandra Narayan Singh* 3, where this doctrine is affirmed. An exception has been made to this broad rule in cases of bankruptcy petitions and winding up petitions. But no case has been shown to us where the procuring of the process of Court in interlocutory proceedings has been held to found an action. And I am unable to see on what principle a man is more entitled to damages for the action of a plaintiff in a suit in applying for attachment before Judgment even though maliciously than he is for the action of the plaintiff in bringing a suit maliciously and without reasonable and probable cause on false allegations of fact. If the original suit is protected it seems to me clear that proceedings in the suit must be protected unless they constitute abuse of the process of the Court. Further even if there is a difference between the presenting of interlocutory applications and the bringing of a suit I am unable to see how the making of an application necessarily and naturally involves a damage. I cannot see how a man's credit naturally suffers more in the one case than in the other. The decisions as to bankruptcy and winding up are special cases arising out of the publication of the petitions. There is no such publication in an application for attachment. I cannot but think that it would be most ill advised to introduce the principle that applications of an interlocutory nature in a suit can found an action however malicious. An application for discovery may result in far more damage *i. e., damnum* to a party to a suit than the action itself and for this reason, these applications are frequently taken

1. (1910) 2 K. B. 244. 2. (1883) 11 Q. B. D. 674.
3. (1914) I. L. R 42 C. 550.

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to the Court of Appeal and have even resulted in settlement of the suit. But it has never been suggested that such an application however malicious, would found an action. I would therefore dismiss this appeal both on the ground that an interlocutory application in a suit does not of itself found an action and also on the ground that damage does not necessarily and naturally flow from such an application. Appeal dismissed with costs.

Sadasiva Aiyar, J.:—I agree.

PRIVY COUNCIL.

Present:—Viscount Haldane, Lord Parmoor, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the High Court at Bombay.]

Jamshed Khodaram Irani ... *Appellant* *

v.

Burjorji Dhunjibhai Contractor ... *Respondent.*

Khodaram Irani v. Burjorji Dhunjibhai Contractor.

*Specific Performance—Contract for sale of Land—*Prima facie *time not of the essence of the Contract—Indian Contract Act S. 55—Equity—Rule of, explained —Indian and English Law, same.*

In the case of contracts for the sale of land, time is presumed in equity not to be of the essence of the contract and specific performance will be enforced notwithstanding the failure to keep the dates assigned by the contract if justice can be done and there is nothing in the express stipulations, the nature of the property or the surrounding circumstances which would make it inequitable to interfere with and modify the legal rights of parties.

The Indian Legislature only embodies this doctrine of Equity in S. 55 of the Indian Contract Act.

Equity will not assist where there has been undue delay on the part of one party to the contract and the other has given reasonable notice that he must complete within a definite time.

Equity looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. *Prima facie*, it treats the importance of such time limits as being subordinate to the main purpose of the parties and where reliance is placed upon an express stipulation as excluding the ordinary presumption, the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable.

An intention that time should be of the essence of the contract may be inferred from what has passed between the parties prior to the signing of the contract but not from what takes place after the contract has been entered into unless it amounts to an agreement to modify the terms of the earlier contract.

* 6th December 1915.

P. C.

Khodaram Irani v. Burjorji Dhunjibhai Contractor.

On 8th July 1911, the respondent agreed to sell his lease-hold interest to the appellant for Rs. 85,000 and the appellant paid Rs. 4,000 as a deposit. The agreement provided that the conveyance was to be prepared and received within 2 months, that on signing the document of sale Rs. 80,500 was to be paid, and after its registration the remaining 500; but should the purchaser not pay the amount within the fixed period, he was to have no right to the deposit and the vendor was, after that date, to be at liberty to re-sell. The appellants' solicitors proceeded to investigate the title and made certain requisitions in respect of it on the 3rd October. The respondent did not comply with the requisition but on the 6th October, asserted his right to put an end to the contract. In a suit for specific performance by the appellant (vendee).

Held, that there was nothing in the contract or in the circumstances to entitle the vendor to insist upon time being treated as of the essence of the contract and that the plaintiff was entitled to specific performance.

Tilley v. *Thomas* [1] approved. *Stickney* v. *Keeble* [2] referred to.

Appeal from a Judgment and Decree of the High Court dated February 17, 1913 reversing a Judgment and Decree of the same Court, Original Side, dated July 30, 1912.

The facts of the case are sufficiently set forth in their Lordships' judgment.

Sir R. Finlay, K.C. and K. Brown for the appellant: Time was not the essence of the contract and did not become so by reason of the subsequent correspondence. S. 55 of the Indian Contract Act lays down the principles on which specific performance was ordered in India. It is the same here in England. Equity interferes where the intention of the parties is not to make time essence of the contract *Stickney* v. *Keeble* [2]. *Prima facie* the rule in Equity is to ascertain the intention of the parties whether they intended the time mentioned to be of the essence of the contract from the surrounding circumstances as existed at the time of signing the contract. The Law is the same in India. The clause in the contract was assumed by both parties not to make time essence of the contract.

Leslie Scott, K.C. and *Raikes* for respondent:—Time was of the essence of the contract.

That must be gathered from the language of the contract itself. The language in *Stickney* v. *Keeble* [2] was essentially different. You must look to the substance of the contract.

Lord Haldane:—You must show that there was imported into the contract an intention to exclude the Equity Jurisdiction.

Time was of the essence of the contract unless it was expressly otherwise stipulated or the nature of the contract did not admit

1. (1867) L. R. 3 Ch. App. 61.
2. (1915) L. R. A. C. 386.

P. C.

Khodaram Irani v. Burjorji Dhunjibhai Contractor.

of it or from the surrounding circumstances it appeared that parties did not wish it to be of the essence.

Equity jurisdiction in India is defined by the Specific Relief Act. It draws no distinction between land and other contracts. Plain and unambiguous meaning of words in a deed should be followed although parties have interpreted them differently.

Reference was made to *Inglis* v. *Buttery* [1], *G. & C. Kreglinger* v. *New Patagonia Meat and Cold Storage Company Limited* [2], *Seton* v. *Slade* [3], *N. E. Ry. Co.* v. *Lord Hastings* [4], *Thomas* v. *Tilley* [5], *Hudson* v. *Temple* [6], *Gedge* v. *Montron* [7], *Barclay* v. *Messinger* [8], *Hudson* v. *Bartram* [9], *Lennon* v. *Napper* [10], *Roberts* v. *Berry* [11], Specific Relief Act, S. 12 and 26. Transfer of Property Act, Ss. 55, Indian Evidence Act, S. 91 and 92.

Sir Robert was not called upon to reply.

The Judgment of their Lordships was delivered by

Viscount Haldane:—The question in this Appeal is whether the appellant, who was the plaintiff in an action for specific performance, is entitled to the relief he has claimed. Macleod, J., decided that he is so entitled, but the High Court in appeal at Bombay reversed the decision and dismissed the action.

The facts may be stated briefly. The Government of Bombay, in 1898, granted to one Mothabai Bhikaji a reclamation lease of over 2,000 acres of land near Bombay for a term of 999 years. The lease provided that the lessee should reclaim the land and bring it under cultivation within a period which was ultimately extended to the year 1910. He was also to maintain the reclamation throughout the term, and keep up certain roads, and make and maintain certain waterways and boundary marks, to the satisfaction of the local Collector. The lessee was, further, not to assign or underlet, until the reclamation was complete, without the consent in writing of the Collector. In case of breach of any covenant or condition, or provision of the lease the lessor had the right to re-enter and determine the lease. The lease was

1 (1878) 3 A. C. 557.
2. (1914) A. C. 35.
3. (1802) 7 Ves. 132.
4. (1900) A. C. 260.
5. (1867) L. R. 3 Ch. A. 61.
6. (1860) 29 Beav. 535.
7. (1858) 26 Beav. 45.
8. (1874) 43 L. J. Ch. 449.
9. (1818) 3 Madd. 440.
10. (1802) Sch. and Lef. 682.
11. (1853) 3 D. M. and G. 289

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transferred in 1908 to the respondent, who had purchased it from the lessee.

On the 8th July 1911 the respondent agreed in writing by a document in Gujrati, a translation of which was before their Lordships, to sell the leasehold interest to the appellant for Rs. 85,000, and the appellant paid Rs. 4,000 of this sum as a deposit or earnest. This agreement provided, by Clauses 1 and 2, that the title was to be made marketable; that the conveyance was to be prepared and received within two months from the date of the agreement; that on signing the document of sale Rs. 80,500 were to be paid, and after its registration the remaining Rs. 500. The 5th Clause provided that on payment of the Rs. 81,000, as provided by Clause 2, the document of sale or conveyance was to be executed, but should the purchaser not pay the amount within the fixed period abovementioned he was to have no right to the deposit or earnest money of Rs. 4,000 paid on account, and any claim of his was to be void, and the vendor was, after that date, to be at liberty to resell.

There was a subsidiary agreement that the respondent should buy certain land belonging to the appellant for Rs. 30,000, to be deducted from the Rs. 81,000, but on this nothing turns.

The appellant's solicitors proceeded to investigate the title, and they made requisitions. Of these requisitions some related to the rights of one Chimanlal, who had professed to make a title as heir to his father, one of certain mortgagees of the interest of Mothabai Bhikaji. Another of the requisitions was for a certificate or letter from the Collector stating that all the covenants and conditions of the lease had been performed and fulfilled. This requisition was made on the 3rd October 1911, more than two months after the date of the contract. The respondent did not comply with these requisitions, but on the 6th October, through his solicitors, asserted a right to put an end to the contract on the ground that time was of its essence, and to forfeit the deposit on the ground that the appellant had failed to complete his purchase within the date fixed.

If these requisitions were made in time their Lordships are of opinion that they were proper, and that they were not adequately answered. If time was not of the essence of the contract it is clear that they were legitimately made, however the matter might stand to as one or other of them if time were of the essence. This

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last question therefore lies at the root of the controversy, and the answer to it is decisive of the appeal.

The law applicable to the point is contained in S. 55 of the Indian Contract Act, 1872, which provides that "when a party to "a contract promises to do a certain thing at or before a specified "time, or certain things at or before specified times, and fails to "do any such thing at or before the specified time, the contract, "or so much of it as has not been performed, becomes voidable "at the option of the promisee, if the intention of the parties was "that time should be of the essence of the contract."

Their Lordships do not think that this section lays down any principle which differs from those which obtain under the law of England as regards contracts to sell land. Under that law Equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. The principle is well expressed in what Lord Redesdale said in his well-known judgment in *Lennon* v. *Napper* [1] which was adopted by Knight-Bruce, L. J., in *Roberts* v. *Berry* [2]. The doctrine laid down in these cases was again formulated by Lord Cairns in *Tilley* v. *Thomas* [3] and by the House of Lords in the recent case of *Stickney* v. *Keeble* [4]. Their Lordships are of opinion that this is the doctrine which the section of the Indian Statute adopts and embodies in reference to sales of land. It may be stated concisely in the language used by Lord Cairns in *Tilley* v. *Thomas* [5] :—

"The construction is and must be in equity, the same as in a Court of Law. A "Court of Equity will indeed relieve against and enforce specific performance, not-"withstanding a failure to keep the dates assigned by the contract; either for "completion or for the steps towards completion, if it can do justice between the "parties, and if (as Lord Justice Turner said in *Roberts* v. *Berry* [6]) there is "nothing in the 'express stipulations between the parties, the nature of the "'property, or the surrounding circumstances,' which would make it inequitable to "interfere with and modify the legal right. That is what is meant, and all that "is meant, when it is said that in equity, time is not of the essence of the contract. "Of the three grounds mentioned by Lord Justice Turner 'express stipulations' "requires no comment. The 'nature of the property' is illustrated by the case of

1. (1802) 2 Sch. and Lef. 682.
2. (1853) 3 D. M. and G. 284 at p. 289.
3. (1867) L. R. 3 Ch Ap 61.
4. (1915) L R. A. C. 386.
5. (1867) 3 Ch. Ap. 61.
6. (1853) 3 D. M. and G. 284 at p. 289.

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"reversions, mines or trades. The 'surrounding circumstances' must depend on "the facts of each particular case."

Their Lordships will add to the statement just quoted these observations. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation. *Prima facie*, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of Law the contract has not been literally performed by the plaintiff as regards the time limit specified. This is merely an illustration of the general principle of disregarding the letter for the substance which Courts of Equity apply, when, for instance, they decree specific performance with compensation for a non-essential deficiency in subject-matter.

But equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases, the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction. Equity will further infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract. *Tilley* v. *Thomas* [1] where specific performance was refused, illustrates this class of transaction. But in such a case the intention must appear from what has passed prior to the contract, the construction of which cannot be affected in the contemplation of equity by what takes place after it has once been entered into.

1. (1867) L. R. 3 Ch. App. 31.

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Applying these principles to the agreement before them, their Lordships are of opinion that there is nothing in its language or in the subject-matter to displace the presumption that for the purposes of specific performance time was not of the essence of the bargain. They do not think that the subject-matter or the character of the lease sold were such as to take the case out of the class to which the principle of equity applies. They are also unable to hold that the plaintiff bound himself by his correspondence subsequent to the agreement to a new agreement that time, if it was not originally of the essence, should be made so. As to the language of the agreement itself, without dwelling on a possible point in the plaintiff's favour which does not appear to have been raised in the Court below, that the only time limit mentioned refers to his preparation and reception of the conveyance, as distinguished from completion, they agree with Macleod, J., in the view that there is nothing said in it sufficient to exclude the equitable canon of interpretation. And they agree in his conclusion that the defendant had no justification in claiming in the circumstances to treat time as of the essence. They are unable to concur in the opinion of the learned Judges of the High Court in appeal that there was evidence that the plaintiff had not money with which to pay the price, or that the subsequent correspondence and dealings between the parties modified the right of the plaintiff to insist on his right to complete the purchase.

These conclusions render it unnecessary to consider the other points dealt with in the High Court and elaborately argued at their Lordships' Bar. The result is that they think that the appeal ought to be allowed and the judgment of Macleod, J. restored, and that the respondent should pay the costs of this appeal and in the Courts below. They will humbly advise His Majesty accordingly.

Solicitors for appellant :—*Latteys and Hart.*

Solicitors for respondent :—*T. L. Wilson and Co.*

PRIVY COUNCIL.

Present :—Viscount Haldane, Lord Parmoor, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.

(On Appeal from the High Court at Bombay.)

Nagindas Bhugwandas ... ... *Appellant**

v.

Bachoo Hurkissondas ... ... *Respondent*

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Hindu law—Adopted son—Rights of—Suit for partition—Natural born son of one brother and adopted son of the other—Entitled to share equally.

As regards the distribution of family property by partition an adopted son stands exactly in the same position as he would stand if he were a naturally born son of his adoptive father subject to the qualification that if there be a competition between an adopted son and a subsequently born legitimate natural son of the same father, the adopted son takes a less share than he would take if he had been a naturally born legitimate son.

Held, accordingly, in a suit for partition of the family property between the adopted son of one brother and the natural born son of the other that the former was entitled to share equally with the latter.

Raghubanund Doss v. *Sadhuchurn Doss* [1] overruled.

Tara Mohun Bhuttacharjea v. *Kripa Moyee Debia* [2] *Dinonath Mukerjee* v. *Gopal Churn Mukerjee* [3] *Raja* v. *Subbaraya* [4] approved *Pudma Coomari Debi* v. *The Court of Wards* [5] referred to.

Appeal from a Judgment and decree of the High Court dated February 2, 1914 varying a Judgment and decree of the High Court on its original jurisdiction dated November 13, 1913.

One Nagardas Shobhogdas did in 1893 leaving him surviving two sons Bhagwandas Nagardas and Hurkissondas Nagardas who remained joint. Hurkissondas died on September 14, 1900 leaving him surviving only his widow Gangabai, who was then pregnant. Bhagwandas Nagardas died on December 17, 1900 leaving him surviving one daughter, Navalbai, and his widow, Mankorebai, to whom he gave express authority to adopt. On December 18, 1900, the said Gangabai gave birth to a posthumous son the respondent; and on February 17, 1901 the said Mankorebai adopted the appellant. The validity of the said adoption was contested on behalf of the respondent but the appellant's status was finally established upon appeal to the Privy Council.

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* 26th November 1915.

1. (1878) I. L. R. 4 C. 425.
2. (1868) 9 W. R 423.
3. (1861) 8 C. L. R. 57.
4. (1883) I. L. R. 7 M. 253.
5. (1881) L. R. 8 I. A. 229.

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Bachoo Hurkissondas Mankore Bai [1].

A question then arose as to what share the appellant would be entitled to. The High Court (Original Side) held that adoption made no difference and that he was entitled to half the estate. On appeal it was held that as an adopted son he was entitled to a reduced share of one-fourth. An appeal was then preferred to His Majesty in Council in due course.

Sir Robert Finlay, K. C., De Gruyther, K. C., and *Dunne* for the Appellant.

Lord Haldane.—On the death of the two sons the sons of each would inherit per *stirpes.*

It is wrong to apply the rule applicable to natural born son and adopted son of the same person to the present case. An adopted son takes the share that his father would have taken. See Stokes Hindu Law p. 657 Dattaka Chandrika, Dattaka Mimamsa laid down the rule that the adopted son took $\frac{1}{4}$, but it did not lay down the rule with regard to successive generations. Mitakshara Ch. 1, para. 2 and 3 (2) dealt with how partition might be effected. If one were to adopt brother's son, his share would be cut down to $\frac{1}{5}$! There must be something wrong in this as one is recommended to adopt brother's son. There is nothing in Mayukha (Ch. 4 S. 5, para 25) which would make any difference. If a legitimate son adopted, the adopted grandson took his father's share. This was carrying the special rule of succession to two generations. In *Raja* v. *Subaraya* [2] *Raghubanund Doss* v. *Sadhu Churn Doss* [3] was commented upon. Reference was made to *Mahanti* v. *KrishnaCharan Patnaik* [4] *Tara Mohun* v. *Kripa Moyee* [5] *Dinonath Mukerji* v. *Gopal Churn* [6] *Gurulingaswami* v. *Ramalakshmamma* [7] *Bhagwan Singh* v. *Bhagwan Singh* [8] *Pattu Lal* v. *Parbati Kunwar* [9]. Share of an adopted son should be what would have been the share of his adoptive father.

J. A. Clyde, K. C. and Raikes for the Respondent.

Lord Haldane.—An adopted son is not in the same position as a natural born son in the co-parcenary.

1. (1907) L R. 34 I. A. 107.
2. (1883) I. L. R. 7 M. 253.
3. (1878) I. L. R. 4 C. 425.
4. (1884) 14 C. L. J. 183, 187.
5. (1868) 9 W. R. 423.
6. (1881) 8 C. L. R. 57, 62.
7. (1899) L. R. 26 I. A. 113.
8. (1898) L. R. 26 I. A. 153.
9. (1915) L. R. 42 I. A. 155.

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It is a question to be determined on the construction of the Mitakshara. We have to do with the members of an undivided family who have by no means the same rights. A Hindu family is a complex whole. There is *imperium in imperio*. There is no equality among all sons under the Mitakshara.

Lord Haldane.—Is there any authority to say that a properly adopted son was not of the same class ?

Stokes Hindu Law p. 440, Ch. II. Sec. 11 para 21 and 22. Apart from Vasistha's text an adopted son would not come in at all.

Sir John Edge.—There is no such thing as right to a share, but only to share.

The question is whether the text of Vasistha is limited to the particular case.

Mr. Ameer Ali.—5 Cal. 693 was affirmed in *Kali Komul Mozoomdar* v. *Uma Shunkur Moitra* [1].

There are cases in which an adopted son was as good as a natural born son, but in partition it is different. Co-parcenary rights are created (1) by birth and (2) by adoption. According to Mitakshara an adopted son did not take in co-parcenary; he was let in by para. 24 and by construction and analogy. One has to ask what is the full share of each group, if a son was adopted he got one share and if a grandson he took a different share. Every grandson is the owner of his father's share; an adopted son of a natural son took the share equal to that of others and therefore he was equal to others or in other words, all grandsons took the share of their father and the father of the adopted son was equal to other sons.

Lord Wrenbury.—A natural son displaces an adopted son; but here the competition is between two *stirpes*.

In Gujarat Mitakshara and Mayukha are authorities and in case of difference between Chandrika and Mitakshara the latter prevails. A natural grandson would offer funeral cake to grand-father whereas an adopted grandson to his father only. [*Mr. Ameer Ali.* What is your authority for that ?] Sarvadhikari's Inheritance p. 23.

1. (1883) L. R. 10 I. A. 138.

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Reference was made to *Raghubanand Dass* v. *Sadhu Charan Dass* [1]. Mayne's Hindu Law, para. 104, Sarcar's Hindu Law of Adoption (1891) p. 399. West and Bühler pp. 10 and 11 Stokes Hindu Law Books, Mit. p. 422 Dattaka Chandrika S. 29 and 30.

Sir Robert Finlay in reply.

The respondent relied on the text of Vasistha which Mitakshara showed was restrictive. An adopted son acquired the whole right of a natural born son and he was in the same position. S. 11 of Mitakshara had been referred to, but both Dattakas laid down that only natural born and adopted son were entitled : other sons did not exist since 200 B. C. Under *Pudma Coomari Debi* v. *The Court of Wards* [2], an adopted son succeeds collaterally as well as lineally; he inherits in the same way as a natural son *Kali Komul Mozoomdar* v. *Uma Shunkur Moitra* [3]. The Hindu Law enjoins that one should adopt brother's son by preference, but according to the argument of the other side he would take less.

The Judgment of their Lordships was delivered by

Sir John Edge;—The suit in which this appeal has arisen is one for the partition of the joint family property of a family of Gujerathi Hindus, of which the plaintiff by adoption and the defendant by birth are the male members. The question in this appeal is one as to the share in the joint family property to which the plaintiff is on partition entitled.

The property in question belonged to a joint family, the male members of which were in 1900 Bhugwandas Nagardas and Hurkissondas Nagardas, the two surviving sons of Nagardas Shobhagdas who had died in 1893. Hurkissondas Nagardas died on the 14th September 1900, leaving his wife surviving; she was then pregnant, and the defendant, who was the posthumous child, was born on the 18th December 1900. Bhugwandas Nagardas died childless on the 17th December 1900, leaving his widow surviving him ; he had given to her an authority to adopt a son to him, and in pursuance of that authority she, on the 17th February 1901, adopted the plaintiff as a son to her deceased husband. The parties are governed by the Mitakshara, as altered or interpreted by the Vyavahara Mayukha. The plaintiff claimed that he was entitled on partition to a moiety of the family property. On the

1. (1878) I. L. R. 4 C. 425. 2. (1881) 8 I. A. 229.
3. (1883) L. R. 10 I. A. 138.

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other hand the defendant contended that the plaintiff, as an adopted son, was entitled to a reduced share only of the family property; in support of that contention the defendant relied upon paragraphs 24 and 25 of S. 5 of the *Dattaka Chandrika* as those paragraphs were construed and applied in the High Court at Calcutta by Markby and Prinsep, JJ., in *Raghubanund Doss* v. *Sadhu Churn Doss* [1].

This suit was tried in the High Court at Bombay by Macleod, J., who held that the doctrine according to which an adopted son on partition takes only a reduced share in the family property applies only in cases in which the competition is between an adopted son and a natural born son of the same father (which is not the case here), and he gave the plaintiff a decree for an equal share. From that decree the defendant appealed.

On appeal Sir Basil Scott, C. J., and Batchelor, J., holding as their Lordships understand their judgment, that there is nothing in the Mitakshara which is inconsistent with paragraphs 24 and 25 of S. 5 of the *Dattaka Chandrika* as these paragraphs were construed by Markby and Prinsep, JJ., in *Raghubanund Doss* v. *Sadhu Churn Doss* [1] adopted the construction of Markby and Prinsep, JJ., of those paragraphs, and decided that the plaintiff as an adopted son was on partition entitled only to a reduced share in the family property. From their decree this appeal has been brought.

The learned Judges of the High Court on the appeal from Macleod, J., in this suit had before them Sutherland's translation of paragraphs 24 and 25 of S. 5 of the *Dattaka Chandrika*, the translation of those paragraphs which was relied upon by Markby and Prinsep, JJ., in *Raghubanund Doss* v. *Sadhu Churn Doss* [1] and a translation made by Sir Ramakrishna Bhandarkar, which appears to have been accepted as correct by the parties to this suit. Sutherland's translation was not a complete translation of the Sanskrit text. The translation which was relied upon by Markby and Prinsep, JJ., in *Raghubanund Doss* v. *Sadhu Churn Doss* [1] and is apparently accepted as a correct translation by Mr. Mayne in paragraph 169 of his *Hindu Law and Usage*, is as follows:—

Paragraph 24.—"Therefore by the same relationship of brother and so forth, "in virtue of which the real legitimate son would succeed to the estate of a brother

1. (1878) I. L. R., 4 C. 425.

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" or other kinsman, the adopted son of the same description obtains his due share. " And in the event of the ancestor having other sons, a grandson by adoption, " whose father is dead, obtains the share of an adopted son. Where such son " may not exist, the adopted son takes the whole estate even."

Paragraph 25.—"Since it is a restrictive rule that a grandson succeeds to the " appropriate share of his own father, the son given, where his adopter is the real " legitimate son of the paternal grandfather, is entitled to an equal share even " with a paternal uncle, who is also such description of son; therefore a grandson " who is an adopted son may (in all cases) inherit an equal share even with an " uncle. This must not be alleged (as a general rule). For there would be this " discrepancy where the father of the grandson were an adopted son, he would " receive a fourth share; but the grandson if he were such son (of him) would " receive an equal share (with an uncle in the 'heritage of the grand father) and " accordingly, whatever share may be established by law for a father of the same " description as himself, to such appropriate share of his father does the individual " in question (*viz.*, the adopted son of one adopted) succeed. Thus, what had been " advanced only is correct. The same rule is to be applied by inference to the " great-grandson also."

The translation which was made by Sir Ramakrishna Bhandarkar is as follows :—

" It should be understood by this that an adopted son acquires the ownership " wherever possible of his proper share by a relation similar to the relation, brother- " hood, &c., by which a natural-born son acquires a right to the property of his " brothers, &c. Similarly, an adoptive grandson whose adopting father is dead " acquires the ownership of the share proper for an adopted (son) when the owner " of the property has got another son or other sons and of the whole when he has " got no son or sons. It should not be argued that because a grandson is neces- " sarily the owner of the share proper for his father, the taker (in adoption) of the " adoptive son being a natural-born son of the grandfather and entitled to a share " equal to that of the uncle similarly born, the adoptive grandson should take a " share equal to that of the uncle; for it involves impropriety, inasmuch as the " adopted son gets one-fourth and the adoptive grandson an equal share. There- " fore that share is proper for a son's father which he would get by law if he were " of the same description (adopted or natural born) as the son. This way should " be followed in the case of great grandsons also."

Their Lordships are not in a position to say which of those translations is the more literal translation, each is obscure, but in the opinion of their Lordships neither translation warrants any conclusion as to the meaning of the author of the *Dattaka Chandrika* other than that at which their Lordships have arrived.

The author of the *Dattaka Chandrika* was in paragraphs 24 and 25 of S. 5 of his Commentary, relying upon the text of Vasistha according to which "when a son has been adopted, if a legiti- " mate son be afterwards born, the given son shares a fourth " part." That text of Vasistha is quoted by Nanda Pandita in " paragraph 1 of S. 10 of the *Dattaka Mimamsa*, who added, on " the death of him (the naturally-born son) he (the adopted son)

"is entitled to the whole." It is obvious that Vasistha and Nanda Pandita were referring to cases in which the competition would be between an adopted son and a naturally-born subsequent son of the same father, and were not referring to cases in which on partition the competition would be between an adopted son of one member of a joint Hindu family and a naturally-born son of another member of the family, as for instance a naturally-born son of a brother or a nephew of the adoptive father.

The author of the *Dattaka Chandrika* expressed his views somewhat obscurely and confusedly in paragraphs 24 and 25 of S. 5 of his Commentary, but their Lordships consider that it is not difficult to ascertain what his meaning was. For the purposes of his Commentary he paraphrased the text of Vasistha that "when a son has been adopted, if a legitimate son be afterwards born, the given son "shares a fourth part," and in paragraphs 24 and 25 of S. 5 he illustrated the text of Vasistha, as he understood that text, by examples of its application.

His meaning is that in cases of the distribution of family property by partition an adopted son stands exactly in the same position as he would stand if he were a naturally-born son of his adoptive father subject to the qualification that if there be a competition between an adopted son and a subsequently born legitimate natural son of the same father, the adopted son takes a less share than he would take if he had been a naturally-born legitimate son. The author of the *Dattaka Chandrika*, applying the well-established rule of Hindu law that a son takes no greater share than his father if a qualified person would have been entitled to, illustrated the application of the principle of the text of Vasistha by contrasting the case of a competition between an adopted son of a naturally-born son and that naturally-born son's naturally-born brother with the case of an adopted son of an adopted son competing with a naturally-born son of his adoptive father's adoptive father, in other words his uncle through the adoption of his adoptive father. In the first case, as the author of the *Dattaka Chandrika* pointed out, the adopted son would take a share equal to that of his uncle by adoption; in the latter case, as a son cannot take a greater share than his father would have been entitled to, the adopted son of an adopted son would take a less share than his uncle by adoption who was a naturally-born

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member of the family, and who would have taken a greater share than his brother by adoption.

As their Lordships construe paragraphs 24 and 25 of S. 5 of the *Dattaka Chandrika* those paragraphs are not in conflict with any principle of the Mitakshara or of the Vyavahara Mayukha, and they are consistent with the reference to the text of Vasistha in paragraph 1 of S. 10 of the *Dattaka Mimamsa.* To construe and apply those paragraphs as they were construed and applied by Markby and Prinsep, JJ., in *Raghubanund Doss* v. *Sadhu Churn Doss* [1] would bring them into conflict with what are now well established principles of Hindu Law. The attention of Markby and Prinsep, JJ., in *Raghubanund Doss* v. *Sadhu Churn Doss,* [1] which was decided by them in 1878, does not appear to have been drawn to the case of *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia* [2] which came on appeal before the High Court at Calcutta in 1868. In that case Loch and Hobhouse, JJ., held that an adopted son took the full share which his adoptive father would have taken in the property of a deceased collateral relative of his adoptive father. In *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia* [2] the plaintiff by birth and the defendant by adoption were in equal relationship to the deceased collateral; their respective grand-fathers were the first cousins of the collaterial and their respective fathers were his first cousins once removed. Loch and Hobhouse, JJ., were pressed in argument to put a construction upon paragraph 25 of S. 5 of the *Dattaka Chandrika* adverse to the claim of the adopted son, but they held that an adopted son is entitled to all the rights and privileges of a son of the body legitimately begotten, where there is no such son subsequently born; and that there was no reason why the plaintiff and the defendant in the suit before them should not each take the share to which their respective fathers were entitled. The parties to the suit which was in appeal before Loch and Hobhouse, JJ., were governed by the law of the Dayabhaga, but the fact does not distinguish that case in principle from the case which is now before this Board. The decision in *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Debia* [3] was followed in 1881 by McDonell and Field, JJ. in *Dinonath Mukerji and others* v. *Gopal Churn Mukerji and others.* [4] In *Raja* v. *Subbaraya* [5], which was, however, a case

1. (1878) I. L. R. 4 C. 425.
2. (1868) 9 Suth. W. R. 423.
3. (1868) 9 W. R. 423.
4. (1881) 8 C. L. R. 57.
5. (1883) I. L. R. 7 M. 253.

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relating to Sudras, Sir Charles Turner, C. J., and Muthusami Aiyar, J., in 1883 doubted that paragraph 25 of S. 5 of the *Dattaka Chandrika* had been correctly construed in *Raghubanund Doss* v. *Sadhu Churn Doss* [1]. Their Lordships are not aware of any case in the High Court at Bombay before the present suit came on appeal before that Court in which the construction of Markby and Prinsep, JJ., of paragraphs 24 and 25 of S. 5 of the *Dattaka Chandrika* has been adopted.

In support of the judgment in the suit of the High Court at Bombay in appeal it was further contended before this Board on behalf of the defendant that the position of a member by adoption in a joint Hindu family, and his interest in the joint family property, are inferior to the position and interest of a member by birth of the family, and it was suggested that an adopted son does not on his adoption become a co-parcener in the joint family property. It was endeavoured to establish that proposition by reference to the place which was assigned by Manu and other early authorities to the twelve then possible sons of a Hindu. As to this contention it is sufficient to say that whatever may have been the position and rights between themselves of such twelve sons in very remote times, all of these twelve sons, except the legitimately born and the adopted, are long since obsolete. A discussion as to their rights and interests, even if they could now be ascertained, would be beside the point and could throw no light on the construction of paragraphs 24 and 25 of S. 5 of the *Dattaka Chandrika* or upon the position and rights of an adopted son. Hindu Law and customs have not stood still and what we are now concerned with is the position at the present time of an adopted son in a Hindu family. As early as 1833 this Board in *Sumboochunder Chowdhury* v. *Naraini Debeh and another* [2] considered that according to Hindu Law an adopted son becomes for all purposes the son of the father by adoption. This Board in 1881 in *Pudma Coomari Debi* v. *The Court of Wards and another* [3] approved of the decision of this Board in *Sumboochunder Chowdhry* v. *Naraini Debeh* [2] and held that an adopted son succeeds not only lineally, but collaterally, to the inheritance of his relations by adoption, and also that an adopted son occupies the same position in the family of the adopter as a

1. (1878) I. L. R. 4 C. 425. 2. (1833) 3 Knapp, 55.
3. (1883) L. R. 8 I. A. 229.

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natural born son, except in a few instances which are accurately defined both in the *Dattaka Chandrika* and the *Dattaka Mimamsa*. Those excepted instances relate to marriage and to competition between an adopted son and subsequently born legitimate son to the same father. To the same effect is the decision of this Board in *Kali Komul Mozoomdar* v. *Uma Shunkur Moitra*[1]. In the last mentioned case when it was before the Full Bench of the High Court at Calcutta, Romesh Chunder Mitter, J., held that—

> "According to Hindu Law an adopted son occupies the same position, and has "the same rights and privileges in the family of the adopter, as the legitimate son, "except in a few specified instances, which have been clearly and carefully noted "and defined by writers on the subject of adoption. The theory of adoption involves "the principle of a complete severance of the child adopted from the family in "which he is born, both in respect to the paternal and the maternal line, and his "complete substitution into the adopter's family as if he were born in it."

With that statement as to the Hindu Law of adoption their Lordships agree.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and that the decree in appeal of the High Court at Bombay should be set aside and the decree of Mr. Justice Macleod should be restored.

The respondent must pay the costs of this appeal and of the appeal in the High Court.

Solicitors for appellant :—*Hughes and Son.*

Solicitors for Respondent :—*Latteys and Hart.*

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1. (1881) L. R. 10 I. A. 138.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Kunhammad Kutti ... *Appellant** (*Counter Petitioner.*)

v.

Panchara Alleema and another. *Respondents.* (*Petitioners.*)

Kunhammad Kutti v. Panchara Alleema.

Malabar Tenants Improvements Act (*Act I of* 1900) *Ss.* 15, 6 (3)—*Re-valuation of improvements—Government notification reversing rates—No ground for.*

Neither S. 15 nor S. 6 (3) of the Malabar Tenant's Improvement Act allows a re-valuation of improvements unless since the last valuation there has been a change in the condition of the improvements or additional improvements have been effected.

Held, accordingly, a revision of rates on the basis of a Government notification published since the date of the decree was unauthorised.

Veluthamana v. *Pathuma* [1] followed.

Appeal against the decree of the District Court of North Malabar dated 18th day of August 1914 in A. S. No. 627 of 1913 preferred against the order of the Court of the District Munsif of Tellicherry in M. P. No. 1460 of 1913 (O. S. No. 263 of 1912).

The plaintiff obtained a final decree dated 20th February 1913 for eviction in the Court of the District Munsif of Tellicherry on deposit of the value of improvements submitted by a Commissioner on 3rd October 1912. The plaintiff deposited in Court the amount decreed in accordance with the Commissioner's account and obtained recovery of the plaint property on 27th July 1913. Between the decree for eviction and its execution a new commutation rate had come in. Gazette notification published on 13th February 1913 allowed a value of Rs. 35-2 for 1000 cocoanuts, the previous value being only Rs. 30-3-0. An application was made to re-value the improvements on the basis of the Government notification. The Lower Court found that there was no alteration in the condition of the improvements. The District Judge holding that S. 20 of the Act applied allowed the higher rate of compensation which came into force.

K. Govinda Marar, Vakil for Appellants.

C. Madhavan Nair, Counsel for Respondents.

The Court delivered the following

Judgment:—Following the case of *Veluthamana* v. *Pathuma* [1] we hold that neither S. 15 nor S. 6 (3) of the Improvements Act allows a re-valuation of improvements unless there have been

* C. M S A. No. 132 of 1914. 20th August 1915.

1. (1913) 17 I. C. 131.

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additional improvements effected after the first valuation or there has been a change in the condition of the improvements.

S. 20 referred to by the District Judge has no relevancy.

The District Judge's order is set aside and that of the Munsif restored with costs of the defendants in this and the Lower Appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Manjappa Ajri and another ... *Appellants* (Defendants Nos. 5 and 6.)*

v.

Marudevi Hengsu and others ... *Respondents (Plaintiffs Nos. 1 to 7, Defendants Nos. 8 to 11 and 7th Defendant's L. R. and 2nd Defendant).*

Manjappa Ajri v. Marudevi Hengsu.

Aliyasantana Law—Inheritance—Property of an individual member—Nearest branch, not nearest relation succeeds.

Under the Aliyasantana Law, the property of an individual member of the family goes on his death not merely to the nearest individual relation or relations but to all the members of the nearest branch.

Antamma v. *Kaveri* 1 explained.

Second Appeal against the decree of the District Court of South Canara in A. S. No. 429 of 1912 preferred, against the decree of the Court of the Subordinate Judge of South Canara in O. S. No. 32 of 1911.

J. L. Rosario and *K. P. Lakshmana Rao* for Appellants.

B. Sitarama Rao and *H. Balakrishna Rao* for Respondents.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments:—*Sadasiva Aiyar, J.*—The Defendants Nos. 5 and 6 are the appellants. They and the Plaintiffs and the 2nd defendant and the 2nd defendant's son, the 4th defendant, all belong to an Aliyasantana family. The 2nd defendant (mother of the 4th defendant) is the maternal aunt of the plaintiffs and of the defendants Nos. 5 and 6 and she is the senior lady in the tavazhi of the 2nd defendant's mother. As such senior lady in the branch of second defendants' mother, she was the Ejamanathi or manager of the branch. The 2nd defendant

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*S. A. No. 907 of 1914. 2nd November 1915.

1. (1884) I. L. R. 7 M. 575.

Manjappa Ajri v. Marudevi Hengsu.

Sadasiva Aiyar, J.

was one of four sisters. Of the four sisters the 2nd defendant is the only one now surviving. One of the other sisters had a daughter Kusmaji and the finding of the Lower Courts is that item 1 Schedule B out of the plaint properties (and that is the only item in dispute in this second appeal) belonged to Kusmaji as her self-acquired property. Kusmaji died issueless. The 2nd defendant, the maternal aunt of Kusmaji, was alleged by the contesting 1st defendant to be the sole owner of this item (1) of Schedule (B) and he attached and brought the property to sale as her exclusive property in execution of a decree obtained by him on a mortgage document executed to him by the 2nd defendant. It has been found by the lower courts that the mortgage debt contracted by the 2nd defendant and the mortgage decree obtained against the 2nd defendant by the 1st defendant are not binding on the plaintiffs and on the defendants Nos. 4 to 6 of whose branch the 2nd defendant is the manager.

The Subordinate Judge dismissed the plaintiff's suit as regards this item (1) of Schedule (B) on the ground that the 2nd defendant, as the maternal aunt of the deceased owner Kusmaji, was the sole heir to Kusmaji's self-acquired properties and that the plaintiffs and the defendants Nos. 4,5 and 6 (Kusmaji's mother's nephews and nieces) being one degree more remote than the 2nd defendant were excluded by the 2nd defendant. The Subordinate Judge deals with this question in paragraph 18 of his judgment and seems to assume without any discussion that when a female member of an Aliyasanthana family dies, her heir is her nearest relative (or the nearest relatives standing in an equal distance from her by blood relationship) in the female line and not the nearest branch of the family in the line to which she belonged, including all the members of that branch without regard to the question which of the members of that branch stand nearest in blood to the deceased intestate. The District Judge on appeal in a very short and rather unsatisfactory Judgment says thus:—"As I understand the Aliyasanthana Law, the nearest relations succeed first, then the Tavazhi, and last the Tarwad." (I shall avoid the use of the words 'Tavazhi' and 'Tarwad' though the word Tarwad is used in *Anantamma* v. *Kaveri* [1] as they are Malayalam words which are used in respect of persons governed by the Malabar Marumakkathayam Law

1. (1884) I L. R. 7 M. 575.

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whereas the parties to this suit are followers of the Aliyasanthana Law. I shall employ the words "branch" and "family" to denote what correspond to "Tavazhi" and "Tarwad").

In *Anantamma* v. *Kaveri* [1], Turner, C. J. and Muthusami Iyer, J. held that, according to the custom obtaining in South Canara, the self acquisition of a member of a family governed by the Aliyasantha Law devolves upon his death, not upon all the members of the larger *family* to which he belonged, but upon the members of his own branch, in the larger family. Among the members of his own branch themselves, no distinction is made between persons nearer in blood to or remote in blood from the deceased acquirer. I have looked into the original records of that case and the only question argued or considered was whether the members of the deceased's branch alone were his heirs (taking as a class) or whether the members of the larger family (including members of other branches also) took as a class. It was never suggested that an individual heir or individual heirs standing in the same degree of blood relationship to the deceased was or were the heirs. I think this case in *Anantha* v. *Kaveri* [1], is clear authority for the proposition that all the members of the nearest non-extinct branch are the heirs of the self-acquirer. In the present case Kusmaji's own line aud her mother's line are extinct and her heirs must be found among the descendants of Kusmaji's grandmother who all take as a class belonging to that nearest branch. Hence the 2nd defendant, though nearer in blood relationship to Kusmaji, must take only as belonging to Kusmaji's grandmother's branch and she then takes the inheritance with all the other members of that branch. The view of the Lower Courts that the heirship goes to the nearest individual relation or relations by blood and not to all the members of the nearest branch rests on no authority. Mr. Sitarama Rao ingeniously contended that in the Full Bench case *Krishnan* v. *Damodaran* [2], the question whether the nearer blood relations standing in the same degree to the deceased do not exclude the remoter relations was left an open question. I was one of the Judges who, with Sundara Aiyar, J. made the reference to the Full Bench in that case. The question we referred was whether the self acquisition of a female member of Marumakkathayam Tarwad would on her death lapse to the Tarwad of which she

1. (1884) I. L. R. 7 M. 575. 2. (1912) I.L.R. 38 M. 48, s.c. 24 M.L.J. 240 (F.B.)

Manjappa Ajri v. Marudevi Hengsu.

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died a member or whether they would descend to her nearest heirs or her Tavazhi. The language of the referring order was, if I recollect aright, the language of Sundara Aiyar, J. But I am reasonably clear that he had in contemplation only two alternatives, namely, inheritance by all the members of the larger Tarwad or inheritance by all the members of the smaller Tavazhi and not a third alternative, namely inheritance by those members only of the smaller Tavazhi who were nearest in blood relationship to the deceased. Sankaran Nair, J, however at page 53 says:—" The reference also suggests whether the nearest heirs take. This, if intended to refer to a class of heirs other than the Tavazhi, may raise another question". He however, did not deem it necessary to decide that question and his answer to the reference is: "that the self acquisitions of a female do not lapse to her Tarwad but they descend to her Tavazhi: if she has issue, the Tavazhi is composed of that issue; if she has no issue, her mother and her descendants form her Tavazhi". Sundara Aiyar J. and Benson J. did not understand the referring order as raising any-third question and Sundara Aiyar, J. uses the expression " nearest heirs" and " Tavazhi" indiscriminately to mean the same thing. The decrees of the Lower Courts therefore so far as item I of Schedule B is concerned must be reversed and the case remanded to the Lower Appellate Court for a fresh decision in Appeal No. 429 of 1912 on the other questions arising in the case with reference to the above property. Costs will abide.

Napier, J.

Napier J:—I agree. The decision in *Antamma* v. *Kaveri* [1], has remained unchallanged for 30 years as representing the custom of the district of South Canara and I think that it would be most mischievous to re-open this question and institute a fresh enquiry as to custom after the elapse of such a period.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

V. Ramasamy Aiyar ... *Plaintiff* *

v.

The Madras Times Printing and Publishing Co. Ltd. *Defendant.*

Presidency Small Cause Courts Acts S. 69—Reference on application under S. 38 without order for retrial or revival of suit—Contract of service as co-editor—Power

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* Ref. Case No. 12 of 1914. 2nd December 1915.

1. (1884) I. L. R. 7 M. 575.

Ramasamy Aiyar v. The Madras Times, Ltd.

of Managing Director to vary duties and hours of attendance—Suit for salary—No claim for, when not performing duties of appointment—Contract Act S. 54.

A reference under S. 69 of the Presidency Small Cause Courts Act is competent though no formal order is passed granting a new trial or declaring that the suit has been revived before notice is issued to the respondent on the application under S. 38 *Oakshott* v. *British India Steam Navigation Co.* [1] and *Nusservanjee* v. *Pursutum Doss* [2] dissented from.

Held, that in the absence of any express contract as to the duties of the plaintiff who was appointed a co-editor of a newspaper the Managing Director of the company publishing the newspaper was entitled as a matter of law to vary his duties and hours of attendance at the office from time to time provided such variation was not unreasonable or inappropriate to his appointment as co-editor and that he was not entitled to recover his salary for the period during which he failed to perform the duties so assigned to him.

Case stated under S. 69 of the Presidency Small Cause Courts Act of 1882 by the Judges of the Presidency Court of Small Causes, Madras in Full Bench application No. 73 of 1914 (Suit No. 2952 of 1914).

Reference under S. 69 of the Presidency Small Cause Court's Act submitted in accordance with the order of the High Court dated 23rd September 1915 in referred case No. 12 of 1914.

Statement of facts:—Plaintiff was originally the Managing Director and the Co-editor of the defendant newspaper company. His pay as Co-editor was Rs. 250 a month with a carriage allowance of Rs. 100 a month. His duties as co-editor were not defined by any express arrangement between him and the defendant company but he was actually doing the work mentioned in Exhibit "IV" *drawn up by himself as Managing Director.* Early in December 1913 Mr. Ormerod was appointed Managing Director and thereafter, plaintiff ceased to be the Managing Director and continued only as the co-editor. In December plaintiff took two month's leave but was recalled before the expiry of the leave by Exhibit "E." *and joined duty on the 11th of January 1914. The plaintiff was formally dismissed from his office as co-editor on the 21st February 1914 by Exhibit "K."* Plaintiff brought this suit against the defendant company for his salary for December 1913 and January 1914, Rs. 500 and for carriage allowance for 9 days in December and 21 days in January Rs. 100 in all for Rs. 600. The learned trial Judge decreed plaintiff's suit for salary for December and 11 days in January and carriage allowance for 9 days in December and disallowed the rest of the plaintiff's claim for salary and for carriage allowance from the 11th to the 31st

1. (1891) I. L. R. 15 M. 179.
2. (1885) I. L. R. 11 C. 298.

January. Defendant company did not appeal; plaintiff alone appealed to the Full Bench.

When plaintiff rejoined duty *on the 11th January* the Managing Director Mr. Ormerod prescribed *certain duties and hours of attendance for him by Exhibit "E," which were different from those under* Exhibit "IV." Plaintiff declined to admit the Managing Director's authority to vary his hours of attendance and duty and refused to do work according to Exhibit "E" or to do 'extra' work without special remuneration. The plaintiff nevertheless attended office daily for an hour or two as he was ready and willing to do the work he was doing previously. The Managing Director refused to send any work to him; but plaintiff did some work of his own accord of the kind he was doing before his leave. *Such work was not recognised or accepted by the Managing Director.* There is no evidence on record about the powers of the Managing Director.

On the above facts the questions of law on which we have differed and which we refer for the opinion of the High Court are:—

1. In the absence of an express contract fixing the duties of the plaintiff as co-editor, was or was not the Managing Director entitled as a matter of law to vary plaintiff's duties and hours of attendance as he did?

2. Does the plaintiff's refusal to obey the Managing Directors' orders and work according to them disentitled him to his wages from the 11th to the 31st of January though he was not dismissed from service till the 21st February 1914?

The opinion of the Chief Judge on the above questions was:—

1. That the Managing Director was entitled as a matter of law to vary the duties and the hours of attendance as he did.

2. That plaintiff's refusal disentitle him to the whole of his remuneration for the period.

The opinion of the Second Judge on the above questions was:—

1. That the Managing Director was not entitled to vary the duties and the hours of attendance of the plaintiff.

2. That the plaintiff's refusal did not disentitle him to his wages for the period as the defendant company retained plaintiff in their Service and did not dismiss him till 21st February 1914.

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The opinion of the Third judge who took part in the first reference to the High Court is not stated as he is not now a member of this court.

D. Chamier for the plaintiff.

E. R. Osborne for the defendants.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments :—*Sadasiva Aiyar, J* :—This is a reference from the Presidency Small Cause Court made under S. 69 of the Presidency Small Cause Court's Act. S. 69 (1) says that "if two or more judges of the Small Cause Court sit together in any suit and differ in their opinion as to any question of law the Small Cause Court shall draw up a statement of the facts of the case and the point on which there is a difference of opinion and refer such statement with its full opinion on the point for the opinion of the High Court". (2) " When the Small Cause Court refers any question for the opinion of the High Court as provided in Subsection (1), it shall either reserve judgment or *give judgment contingent upon such opinion* ".

The present reference is made by the Small Cause Court (of its own motion I take it), three judges of the Small Cause Court sitting together to decide an application made by the plaintiff under S. 38 in a contested suit having differed in their opinions on the two questions of law mentioned in the referring statement. Mr. Osborne for the defendants has taken the preliminary objection that the reference is incompetent as the three learned Judges could not be said to be sitting together in any suit (S. 69) when hearing the application under S. 38 and that unless they first granted a "New Trial" and revived the suit, they could not "sit" in the suit so as to give them jurisdiction to make the reference to the High Court under S. 69 or to give contingent judgments in so referring. In the present case, two of the three Judges gave judgments rejecting the application under S. 38, contingent on the opinion of the High Court on the questions of law referred. I think that in order to deal with the argument properly, the scope of S. 38 has first to be understood and I shall therefore proceed to consider the same.

S. 38 is one of the four Ss. 37 to 40 in Chapter VI of the Presidency Small ause Courts Act. That chapter is headed 'New Trials and Appeals '. S. 37 says "save as otherwise provided by this chapter or by any other enactment for the time being in force

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every decree and order of the Small Cause Court in a suit shall be final and conclusive". I take it that this means that unless an appeal or revision or a review is provided for by any of the remaining Sections (38, 39 or 40 of the chapter) or by any other law (like the Charter Act), there shall be no such appeal, revision or review of a decree or order of the Presidency Small Cause Court. Again the phrase "New Trials and Appeals" seems to indicate that "appeals" were different from "New Trials" and that a petition of appeal is a different petition from a petition for a New Trial.

S. 38 says that "where a suit has been contested, the Small Cause Court may on the application of either party.........order a New Trial to be held, *or* alter, set aside *or* reverse the decree or order." Is altering, setting aside and reversing a decree or order intended to be distinguished from the ordering of a "New Trial" to be held? I am inclined to hold that the section merely means that when and after a new trial is ordered, the court in such new trial could alter, set aside or reverse the decree or order first passed. The word 'or' before 'alter' should in my opinion be 'and'. Now a court of appeal or revision or a court reviewing its judgment, when it accepts wholly or partially the petition of appeal, review or revision if it does not dismiss the petition wholly, alters or reverses the decision under appeal, review or revision.

As I said before, there are only 4 sections in Chapter VI headed "New Trials and Appeals" and even of these, I find that Ss. 39 and 40 have nothing to do with "New Trials" or "Appeals" but only with removal of suits by a Judge of the High Court from the Small Cause Court to the High Court. This phrase 'New Trial' which does not occur in the Civil Procedure Code seems to be a legacy left by S. 53 of the very old Act 9 of 1850 (relating to Presidency Small Cause Courts) and by S. 21 of Act XI of 1865 (relating to Mofussil Small Cause Courts.) After giving my best consideration to S. 38 I think that an application under S. 38 need not be confined to a prayer for the relief of a 'New Trial' but might also include prayers for modifying or reversing the decree or order passed in the suit. The phrase "New Trial" is more appropriate in countries where trials are held with the help of a Jury. As said in a case referred to in *Ishan Chunder Singh* v. *Haran Sirdar* [1],

1. (1869) 11 W. R. 525.

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"the object of New Trials is to find facts." It seems to me unfortunate, that this expression employed in the loosely drawn Acts of the olden days should have been thought so precious as to necessitate its retention up-to-date in the Presidency Small Cause Court's Act of 1882. Shephard, J. in *Sadasook Gambir Chand* v. *Kannayya* 1 bases his judgment on this expression "New Trial," treats the finding of fact by a Small Cause Court Judge. as if it was the verdict of a jury and then concludes by stating that on an application under S. 38 (S. 37 of Act 15 of 1882 before its amendment in 1895) the Small Cause Court cannot interfere with the finding of fact of the trial Judge unless the finding was such as no reasonable jury ought to have come to. Best J., holds that as under Act XV of 1882 the judges before whom an application under S. 38 of that Act is made can alter, set aside, and reverse the decree or order, they have got all the powers of an ordinary appellate court. Collins, C. J. shortly agrees with reasons and conclusions of Shephard, J. I am, inclined to agree with Mr. Justice Best as regards the powers of Small Cause Court on the application under S. 38 though I do not intend to say that the Judge or Judges hearing and disposing of the application under S. 38 can be called a Court of Appeal. In *Srinivasa Charlu* v. *Balaji Rau* 2 Collins, C. J. and Benson, J. follow *Sadasook Gambir Chand* v. *Kannayya* 1. The learned Judges say that the change of the title of chapter 6 made by Act 1 of 1895 from "New Trials and *Re-hearing*" to "New Trials and Appeals" did not mean that S. 38 gave appellate powers to the judges to whom an application under S. 38 is made. They hold that the word "Appeal" is mentioned in the Title of the chapter only in order to show that no appeal shall lie. In Bouvier's Dictionary "New Trial" is defined as a re-examination of an issue *in fact* before a court *and a jury* which has been tried at least once before the same court; a re-hearing of the legal rights of the parties and of *the disputed facts* before another jury granted by the court on motion of the party dissatisfied with the result of the previous trial upon a proper case being presented for the purpose. And it is said that such a new trial is held either upon the same or different or additional evidence before a *new jury* and probably but not necessarily before a different judge. Then it is said that the usual grounds for a new trial are "the not giving the defendant sufficient

1. (1895) I. L. R. 19 M. 96. 2. (1896) I. L. R. 21 M. 232.

notice of the time and place of trial," "misconduct of parties, counsel or witnesses," "mistakes or omissions of officers in summoning and drawing jurors, " " disqualification of jurors," "the resort of indirect measures to prejudice the jury," "misconduct of the jury," "error of the judge in admitting illegal evidence," "after discovered testimony", "excessive damages granted by the jury" and so on.

I should add that in *Nagur Mira Sahib* v. *Sooku Lal Sowcar* [1] I concurred with Oldfield, J. in following *Sadasook Gambir Chand* v. *Kannayya* [2] and *Srinivasa Charlu* v. *Balaji Rau* [3] which decided that the jurisdiction under S. 38 is not of *an appellate nature.* On the further consideration which I have been able to give to the question in this case, the conclusion that an application under S. 38 is not an application by way of appeal to an Appellate Court seems to me to be correct. The trial of the case was by the Small Cause Court and it is to *the same Small Cause Court* that the application for the new trial is to be made and not to the Superior Court (as it *ordinarily* is, in the case of an appeal or revision). Though under the rules framed by the High Court under S. 9 of the Presidency Small Cause Court's Act, the application under S. 38 is to be heard by a Bench of Judges not less than two including the Trial Judge (see O. 41, R. 3), it cannot be argued that the High Court could not have framed the rule so as to empower the single Judge who tried the suit to hear and dispose solely of the application under S. 38. I feel myself strengthened in the above view upon a consideration to the corresponding provisions in another enactment which contained somewhat similar provisions as to "New Trial". In the old Mofussil Small Cause Court's Act XI of 1865, one single section (S. 21) deals with the setting aside of an *ex parte* decree (where a decree had been passed *ex parte*) and also with the granting of a " New Trial " (where the decree had not been passed *ex parte*). S. 13 of that Act provides only for a single Judge to be appointed in the first instance for each Small Cause Court in the mofussil (unlike S. 8 of Act IX of 1850 and similar sections of the later Presidency Small Cause Court's Act which empower the appointment of more than one Judge for a Presidency Small Cause Court. It is only as an exceptional case and for a limited period that an additional Judge can be appointed under S. 15 of Act XI of 1865 for

1. (1915) M. W. N. 907. 2. (1895) I. L. R. 19 M. 96.
3. (1896) I. L. R. 21 M. 232.

...n Aiyar v. The Madras Times, Ltd.

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a Mofussil Small Cause Court. The application for the setting aside of an *ex parte* decree or for a new trial under S. 21 of Act XI of 1865 can therefore be only to the single Judge who tried the suit (or his successor) and it is clear that he cannot be called a Court of Appeal over himself though the application is in a sense, an appeal to himself to reconsider his own judgment. Act IX of 1887, S. 17 (1) corresponding in part to S. 21 of Act XI of 1865 provides (among other things) not for applications for "New Trials" but for applications (for setting aside *ex parte* decrees and) *for review of Judgments*, thus showing that the application "for New Trial" in the old Code corresponds closely to the application for "review of Judgments" mentioned in Act IX of 1887. I am therefore of opinion that an application under S. 38 of the Presidency Small Cause Courts Act is in the nature of a petition to the same Court to review its judgment and not a memorandum of appeal to an Appellate Court. The absence of a provision in the rules or in S. 38 empowering two or more Judges hearing an application under S. 38 to remand or to send back the case to the Trial Judge *alone* for conducting the "New Trial" if granted, is also in favour of the view that the application under S. 38 is an application for review to the same Court and not a petition of appeal, the Court hearing the application being intended to deal finally with the case on the review. I find that the notice issued to the other side on the application under S. 38 in this case is "to show cause why the suit should not be *tried in Full Bench* of the Court" showing that the Full Bench is to finally retry it and dispose of it.

As regards the point directly in question Mr. Osborne relied on the decisions in *Oakshott* v. *British Indian Steam Navigation Co* [1]. In that case, it was held that the words "sitting in any suit" in S. 69 presuppose that a suit is actually pending and if the application for a new trial is rejected even by a conditional judgment of the majority, the suit was never pending before the Court and that no reference can be made and no judgments contingent upon the opinion of the High Court can even be pronounced under S. 69, Cl. 2 for the purpose of making any such reference till a "New Trial" is first granted on the application under S. 38 so as to have the suit pending in the Small Cause Court. The learned Judges fortified their opinion (as above) by the decision of the

1. (1891) I. L. R. 15 M. 179.

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Calcutta High Court in *Nusserwanjee* v. *Pursutum Doss* [1] (which follows an earlier case in *Hall* v. *Joakim* [2]). With the greatest respect, I find myself unable to agree with the above decisions. The application under S. 38 is clearly made in the suit itself. Though the majority of the contingent judgments given on an application under S. 38 would have the effect of rejecting the application if they come into force by reason of the opinion of the High Court agreeing with the opinion of that majority, they would so come into force only from the date when the opinion of the High Court is so favourably pronounced. Till then, the application and the suit in which the application was made must be deemed to continue to be pending. It cannot be denied that the suit and the application would be pending in the Small Cause Court if the High Court disagreed with the Small Cause Court's view. Why should they have ceased to be pending because there is the other contingency that the High Court may agree with the opinion of the majority that the application should be rejected ? I am inclined to respectfully follow the opinion of Sir Barnes Peacock, C. J., in the case in *Ishan Chunder* v. *Haran Sirdar*[3]. In that case it was contended that the Mofussil Small Cause Court Judge had no power under S. 22 of Act XI of 1865 or S. 1 of Act X of 1867 (which supplemented Act XI of 1865) to make a reference as the question of law did not arise " in the trial of the suit" (S. 22 of Act XI of 1865) or " at any point in the proceedings previous to the hearing of the suit " (S. 1 Act X of 1867). There, the application was made to the Judge after the case had been heard and decided and it was contended that the stage at which the application was made was not a stage previous to the hearing of the suit or a stage in the trial of any suit as a "new trial" had not been granted before the reference was made. The learned Judges however ruled that an application for "new trial" under the Mofussil Small Cause Court's Act XI of 1865 was a "point in the proceedings previous to the hearing of a suit within S. 1 of Act X of 1867 " and that the opinion of the High Court on the question of law arising on the hearing of such an application can be properly applied for by a reference to the High Court. I do not see much difference between " sitting in a suit in respect of a point in the proceedings previous to the hearing of a suit " and

1. (1885) I. L. R. 11 C. 298. 2. (1873) 12 B. L. R. 34.
3. (1869) 11 W. R. 525.

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"sitting in a suit." If there is any difference, it is one which makes Sir Barnes Peacock's opinion still more favourable to the applicant under S. 38 of the Presidency Small Cause Court's Act as the restriction "in respect of a point previous to the hearing of the suit" does not appear in that section as it does in S. 1 of Act X of 1867. I find again that in *Lodd Govindoss Krishnadoss* v. *Rukmani Bai* [1] Miller and Sankaran Nair, JJ. held that when two or more Judges of the Small Cause Court sit together for the purpose of exercising the jurisdiction conferred by S. 38 of the Presidency Small Cause Court's Act, they are sitting in a suit within the meaning of those words in S. 69. In that case, however, the two Judges composing the Full Bench of the Small Cause Court were inclined by their *contingent* judgments to reverse the trial Judge's view on the question of limitation though they did not in so many words grant a "new trial" on that ground before they made the reference. In the case in 15 Madras and 11 Calcutta, the learned Judges seemed to think that the proper course for the judgment of the Small Cause Court was, before giving their contingent judgments to have formally granted a "new trial" and thus bring back the suit on the record so as to enable them to "sit in" it and then to make the reference and then give their contingent judgments as to the proper decree to be passed in the suit. It seems to me that if the words "granting a new trial" (as I apprehended) mean only the rehearing of the case on review, it is taking too narrow and technical a view of the scope of S. 69 to hold that the Judges sitting to hear such an application are not sitting in the suit till they pronounce some formal words to the effect that they grant a "new trial." As Sir Barnes Peacock said in *Ishan Chunder* v. *Haran Sirdar* [2] "We must give a reasonable construction to this Act, and we must give it with reference to the powers of the Small Cause Court. The Small Cause Court has power to grant a new trial. If it had granted a new trial, there can be no doubt that the hearing on the new trial would have been a hearing within Act XI of 1865, S. 22, and then the Judge might have asked our opinion on a point of law. If the hearing on a new trial would have been a hearing within the meaning of S. 22 of the Act, the application for a new trial was a point in the proceedings previous to the hearing of the case. If we were to hold that

1. (1913) 1 L. W. 529.
2. (1869) 11 W. R. 527, and 528.

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an application for a new trial was not a point in the proceedings previous to a hearing unless the application should result in a hearing, we should compel the Judge to grant a new trial, in order that upon the hearing under it he might ask the opinion of the Court on a point of law, which if we could have asked it on the application for a new trial, might save the necessity of granting it. It appears to me that we would be putting a very restrictive meaning on the words of the Act which was never intended, if we were to hold that the Judge could not ask our opinion on a question of law *upon an application for a new trial.*" I am further of opinion that it must be held that a Rule Nisi for a new trial is impliedly granted (O. 41, R. 4) when notice is ordered to be issued to the opposite party on the application under S. 38 as Rule 4 says "If the Court, after hearing the applicant or his pleader, considers that there are grounds for the application *it shall grant a rule* nisi *for a new trial, and shall direct notice to issue to the other party.*" If such a rule *nisi* was granted, the suit was clearly revived and was pending and the contingent judgments have not yet discharged that rule *nisi*. *Oakshott* v. *The British Indian Steam Navigation Co.* [1] followed *Ralli Brothers* v. *Gocul Bhai Mulchund* [2] and *Hall* v. *Joachim* [3]. But it seems to me with the greatest respect that the fact was overlooked in *Oakshott* v. *The British Indian Steam Navigation Co.* [1] that from the 15th August 1882 (see *Fort. St. George Gazette* of that date Part. II, page 920) a rule passed by this High Court has existed that a rule *nisi* for new trial has to be granted simultaneously with the granting of an order for notice to be issued to the opposite party and before the application under S. 38 is finally heard and decided. I am therefore not prepared to follow the decision in *Oakshott* v. *The British Indian Steam Navigation Co.* [1]. I think that the reference is competent though no formal order was passed granting a new trial or declaring that the suit has been revived before the notice was issued to the defendant on the application under S. 38. The preliminary objection is therefore overruled.

Napier, J.

Napier, J.:—I regret to say that I find myself entirely at variance with the views expressed by some judges of this Court as well as judges of other High Courts as to the construction of Chapter VI of the Presidency Small Cause Court's Act, XV of 1882. There must be therefore difficulties which I have been

1. (1891) I. L. R. 15 M. 179. 2. (1891) I L. R. 15 B. 376.
3. (1873) 12 Beng. L R. 34.

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unable to appreciate. I would simply construe the plain words of the chapter without reference to any previous enactment as I can find nothing ambiguous in the language. S. 37 provides for the finality of the decisions of the Court except where special provisions are made. S. 38 contains one of such provisions. It allows an application to be made to the Court within eight days from the date of the decree or order in the suit. On that application the Court may do any one of four things. It may order a new trial to be held; it may alter the decree or order; it may set aside the decree or order; it may reverse the decree or order. These powers are very nearly the same as those given to appellate courts in appeals from inferior courts under S. 107 of the Civil Procedure Code, namely (*a*) to determine a case finally (*b*) to remand a case (*c*) to frame issues and refer them for trial. There are no specific provisions for the exercise of the powers of appeal from the Original Side of the High Court by the Appellate Side but these same powers have always been exercised. The English procedure empowers the Court of Appeal to grant a new trial as well as to exercise its powers of reversing and altering. I am therefore unable to understand why when the usual powers of an Appellate Court to alter, set aside or reverse a decree are found in conjunction with a power to order a new trial it should be held that these ordinary powers are only to be exercised in or with an order granting a new trial. In my humble opinion the heading of the chapter expresses accurately the scope of the section. "New Trials and Appeals". I am therefore of opinion that an order or rule which limits the exercise by the Small Cause Court of its jurisdiction under S. 38 to making orders granting or refusing new trials and any order or rule requiring parties to apply for a new trial is *ultra vires*.

The next point turns on the construction of the section under which the reference has been made. S. 69 provides as follows: "If two or more judges of the Small Cause Court sit together in any suit or in any proceeding under Chapter VII of this Act and differ in their opinion as to any question of law, etc., the Small Cause Court shall draw up a statement of the facts of the case and the point on which there is a difference of opinion and refer such statement with its own opinion for the opinion of the High Court, and shall either reverse judgment or give judgment contingent upon such opinion." It further provides that the

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High Court shall hear the reference as if it was a reference under the Code of Civil Procedure, O. 46. It has been argued before us that, as the suit was dismissed and as the Small Cause Court did not make an order for a new trial in this case, the judges were not sitting together in a suit. I recognise that there is high authority for this contention. But I am unable to agree with the view that when the suit has been dismissed the Court can only make a reference when it orders a new trial contingent on the opinion of the High Court. First, I am unable to appreciate the proposition that the question whether the judges are sitting in a suit will depend on the result of their decision. Secondly, I find it difficult to imagine a case where the judges agree on a question of fact and yet order a new trial. A new trial necessarily implies that evidence shall be taken again with possibly fresh evidence on some point on which evidence has been shut out by the trial judge. It seems difficult to understand how in such a case the judges can draw up a statement of the facts of the case prior to the new trial. Thirdly, I do not understand how if this view is correct the judges can refer if they have reserved judgment which they were permitted to do by the language of the section. Lastly, I find it difficult to accept the view enunciated in one case, obviously to get over the difficulty, that the new trial is to be held by the Bench itself on presumably the evidence taken in the first trial. I can only say that such a procedure is elsewhere unknown to law and gives an entirely new meaning to the word 'trial'. All these difficulties arise out of the use of the words "sitting in any suit". In my opinion there is no difficulty in giving to these words a meaning which will make the procedure quite simple. The word 'suit' is not defined in the Act. The section does not use the language 'in the trial of the suit'. Nor is it anywhere provided that a suit terminates when a decree has been given. S. 37 speaks of the decree being given in a suit and I read the language of S. 38 as specifically keeping the suit alive for eight days after decree for the purpose of empowering the Court to exercise the appellate powers given to it by that section. There is in my mind therefore no difficulty in holding that applications for new trial and for reversal of the decree are made in the suit and if that is so all the difficulties disappear. If the suit is not still in existence for the purposes of this chapter, I fail to see how effect can be given to the policy of the chapter. Obviously it was not

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intended to apply to the stage of trial for, two or more judges do not sit together in the trial of a suit. If therefore the plaintiff's claim has been dismissed by the decree and the suit does not continue for the purpose of this chapter, an unsuccessful plaintiff is deprived of the privilege of having a reference by the judges. Though he can apply for a reversal under S. 38, I know of no principle on which an unsuccessful defendant should be given higher rights than an unsuccessful plaintiff. In my view an application under S. 38 is rightly made as it is in practice headed 'in the suit' whether the claim has been allowed or dismissed. It follows therefore that the judges who have given judgments contingent upon such opinion have been sitting in the suit and this preliminary objection fails.

The case came on for final hearing.

D. Chamier for plaintiffs.

E. R. Osborne for the defendants.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments :—*Sadasiva Aiyar, J.* :—This is a reference made by the Presidency Small Cause Court, Madras. We gave judgments yesterday overruling the preliminary objection taken by Mr. Osborne, counsel for the defendant.

As regards the first question referred to us, my opinion is as follows :—In the absence of any express contract as to the duties of the plaintiff as co-editor at the time of his appointment, the reasonable view on the facts of the case seems to me to be that the managing director was entitled as a matter of law to vary the plaintiff's duties and the hours of his attendance at the office from time to time, if such variation was not unreasonable or inappropriate to his appointment as co-editor. The variation made in this case under Ex. E was in my opinion not at all unreasonable or inappropriate.

Coming to the second question, I might observe in the first place that the substantial consideration for the defendant's promise to make certain monthly payments to the plaintiff for his salary was the plaintiff's reciprocal promise to perform the duties reasonably required of him from time to time as appropriate to his post as co-editor. When the plaintiff failed to perform the duties so required of him and during the period for which such failure lasted, the consideration for defendant's promise totally failed and the defendant was not therefore legally bound to pay

to the plaintiff his (the plaintiff's) salary for that period. (See S. 54 of the Contract Act and the illustration (d) thereto, See also *Cuckson* v. *Stones* [1].

The costs of the reference to this Court are to be paid by the plaintiff to the defendant.

Napier, J.:—I entirely agree and only add one word on the first question submitted to us. The statement of facts sets out that there was no express contract fixing the duties of the plaintiff as co-editor and there is nothing to indicate that at any time the Board imported into their contract with the plaintiff, the terms of service which he allocated to himself by virtue of his position as managing director. I have no doubt that it came within the scope of the powers of the managing director, to allocate to the co-editor such duties as were suitable to his position and status as co-editor. When the plaintiff was the managing director, he did allocate to himself such duties, and it is impossible to contend that whereas he had powers to fix his duties as co-editor when he was the managing director, the new managing director had no powers to vary these duties within appropriate limits. An attempt has been made to argue that the duties assigned to the plaintiff by Exhibit E were not consistent with his position. We have examined the various duties assigned to different classes of employees of the Company and we find nothing derogatory to the position of the plaintiff in any particular class of work which the managing director instructed him to do. I therefore think it is clear that it was within the powers of the managing director to vary the plaintiff's duties and hours of attendance as he did and the first question must be answered in the affirmative.

I entirely agree with my learned brother's judgment with regard to the second question and with the disposal of this reference,

Messrs. Rencontre and *Thirumalai Pillai*, Solicitors for plaintiff.

Messrs. King and *Partridge* Attorneys for the defendant.

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1. (1853) 28 L. J. N. S. Q. B. 25.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Kumaraswami Sastri and Mr. Justice Philipps.

Raja Rajeswari Ammal .. *Appellant* * (*Plaintiffs*)

v.

Subramania Archakar and others .. *Respondents* (*Defendants*).

Raja Rajeswari Ammal *v.* Subramania Archakar.

Religious office—Females not disqualified from inheriting to hereditary religious office—Hindu Law and custom—Performance of duties by proxy.

A female is not under Hindu Law or custom disqualified from succeeding to a hereditary religious office and getting such duties performed by proxy.

Ramqsundaram Pillai v. *Savundarathammal* 1 *Thangirala Chiranjivi* v. *Raja Manikya Rao* 2 followed.

Sundarambal Ammal v. *Yogavana Gurukkal* 3 dissented from.

Second Appeal against the decree of the Court of the Subordinate Judge of Tanjore in A. S. No. 90 of 1914 preferred against the decree of the Court of the District Munsif of Tiruvadi in O. S. No. 499 of 1912.

The relevant facts are these:—Kuppa Gurukkal, the father of the plaintiff and the first defendant were brothers, defendants 2 and 3 being the undivided sons of the 1st defendant. Kuppa Gurukkal and the first defendant became jointly entitled to the office of *Archaka* in the temple of Sri Panchanadeswaraswami at Tiruvadi, in the Tanjore District. There was a partition between Kuppa Gurukkal and the first defendant, the latter representing his sons also. At the partition it was arranged that Kuppa Gurukkal and the first defendant should enjoy the *Archaka* right by turns. In pursuance of the aforesaid arrangement, Kuppa Gurukkal was performing the duties of his office sometimes in person and sometimes by proxy till his death in 1910. The plaintiff as the only daughter of Kuppa Gurukkal claimed the right to succeed to her father's *Archaka* right, while the defendants denied her right and prevented her from entering upon the duties of the office and receiving the emoluments thereof. The plaintiff thereupon instituted the present suit against the defendants, for partition and separate enjoyment of *pooja morais* (turns of worship) in the aforesaid temple, which were enjoyed by her father. The District Munsif of Tiruvadi decreed the plaintiff's suit. On appeal, the Subordinate Judge of Tanjore reversed the decree of the District Munsif and dismissed the suit in these terms:—

* S. A. 2203 of 1914. 14th December 1915.

1. (1914) 16 M. L. T. 423. 2. (1914) 27 M. L. J. 179.

3. (1914) 26 M. L. J. 315.

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"The main questions for determination in this appeal are :—

1. Whether the plaintiff's father was entitled to the *pooja morais* (turns of worship).

2. Whether the turns claimed in the plaint can be allowed or a fresh division has to be made.

3. Whether plaintiff by reason of her sex is not entitled to succeed.

(The learned Judge found the first point in favour of the plaintiff.)..............................On the strength of the ruling in *Sundarambal Ammal* v. *Yogavana Gurukkal* [1] the decree of the District Munsif is now contested....................The recent decision of the Madras High Court in *Sundarambal Ammal* v. *Yogavana Gurukkal* [1] is to the point and against the right of a female to succeed to a religious office. From a close perusal of the judgment in *Sundarambal Ammal* v. *Yogavana Gurukkal* [1] and the observations of Mr. Tyabji, J. one may be inclined to think that he is disposed to decide such questions on the merits of each case, after going into the particular custom prevailing in any particular family. Unfortunately there is no such allegation in the plaint setting forth any such custom. ....Plaintiff has specifically come forward saying that she is entitled to her father's rights by inheritance according to Hindu Law...................... When the appeal was argued, plaintiff's vakil filed a petition to permit her to allege such a custom and to remand the suit for trial on that particular issue. I do not know how far such a remand will be useful in the face of the observations of Sadasiva Aiyar, J. in *Sundarambal Ammal* v. *Yogavana Gurukkal* [1]. I therefore find that plaintiff, a female, is not entitled to succeed to the religious office." The plaintiff preferred a second appeal against this decision.

G. S. Ramachandra Aiyar for the Appellant.

I submit that under the Hindu Law, a female is not disqualified from succeeding to the office of *Archaka.* It is not necessary for me to rely on any custom with reference to the particular temple in question. Under the Hindu Law, as well as under the general custom of the country, of which courts ought to take judicial notice, the plaintiff is entitled to succeed to the office in question. Except the *dictum* of Sadasiva Aiyar, J. in *Sundarambal Ammal* v. *Yogavana Gurukkal* [1], there is no

1. (1914) 26 M. L. J. 315 at p. 323.

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authority against me. It is beyond dispute that the office of *Archaka* is hereditary. Even the decision in *Sundarambal Ammal* v. *Yogavana Gurukkal* [1], recognises that the office is in most cases hereditary. If so, there is nothing to exclude females who are entitled under the Hindu Law to succeed to ordinary property, from succeeding to the office of *Archaka.* Incompetency to perform the duties of the *Archaka* office in person, is no bar to succession to the office. A female *Archaka* can have the duties of her office performed by proxy. The Hindu Law recognises the principle that where a person is personally incompetent to perform a religious act, the act can be done by a substitute. See Colebrooke Vol. I, p. 378. The decisions have uniformly recognised the right of a female to succeed to the office of *Archaka.* In fact the right was never questioned till *Sundarambal Ammal* v. *Yogavana Gurukkal* [1]. Reference was made to the following. West and Bühler Vol. I, pp. 410 and 507; Ganapati Aiyar's Religious Endowments p. CLVIII, *Mallikarjuna* v. *Sridevamma* [2], *Dhun Cooverbai* v. *Advocate-General* [3], *Kamalathammal* v. *Krishna Pillai* [4], *Pattabhi Ramanujacharyalu* v. *Alahaswargacharyalu* [5]. *Kakranayya* v. *Padayya* [6], *Tangirala Chiranjivi* v. *Raja Manikya Row* [7], *Mahamaya Debi* v. *Haridas Haldar* [8], *Jalandhar Thakur* v. *Jharula Das* [9]. It is only the decision in *Sundarambal Ammal* v. *Yogavana Gurukkal* [1], that raises for the first time a note of dissent. But even this decision has been dissented from, in *Ramasundaram Pillai* v. *Savundrathammal* [10]. On the principle of *stare decisis* the plaintiff's claim ought to succeed.

S. Subrahmanya Iyer for respondents. The point for decision arose directly only in *Sundarambal Ammal* v. *Yogavana Gurukkal* [1] where it was held that a female is incompetent to succeed to the office of *Archaka.* The disqualification of a female arises from her sex.

[*Kumaraswamy Sastri, J.*:—If sex is no disqualification in the case of succession to ordinary property, why should it be so in the case of an *Archaka* right ?]

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1. (1914) 26 M. L. J. 315, at p. 323.
2. (1897) I. L. R. 20 M. 162.
3. (1899) 1 B. L. R. 743.
4. (1910) 20 M. L. J. 781.
5. (1911) 21 M. L. J. 490.
6. (1910) 8 M. L. T. 325.
7. (1913) 27 M. L. J. 179.
8. (1914) I. L. R. 42 C. 455 at 475.
9. (1914) I. L. R. 42 C. 244 at 252.
10. (1914) 16 M. L. T. 423.

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A female is permanently incompetent to perform the duties of the office and in the case of an *Archaka* office, the duties are more important than the emoluments.

Kumaraswamy Sastri, J. :—She can have the duties done by a substitute. It is open to a male *Archaka* to do so.

In the case of a temporary disqualification *e. g.*, pollution, etc., a male *Archaka* can employ a substitute; but a female is personally and permanently disqualified.

Kumaraswamy Sastri, J. :—Why should it make any difference?

It will be against the policy of the law to allow a female to succeed to the office.

Phillips, J. :—The policy of the law has been to throw open every profession to females.

That is not the Hindu Law. The decisions in *Majavar Ibrambibi* v. *Majavar Hussain Sheriff* [1] *Janokee Debea* v. *Gopal Acharjea* [2] support my contention. In *Ramasundaram Pillai* v. *Savundrathammal* [3] a special custom was proved. Here there is no allegation of any such custom. The plaintiff's claim must therefore fail.

G. S. Ramachandra Iyer (in reply).

The decision in *Majavar Ibrambibi* v. *Majavar Hussain Sheriff* [1], relates to a Mahomedan religious office. *Janokee Debea* v. *Gopal Acharjea* [2] went on appeal to the Privy Council in *Janoki Debi* v. *Gopal Acharjea* [4] and their Lordships found that the ordinary Hindu Law of inheritance did not apply to the devolution of the office in that case. In this case I submit that the ordinary Hindu Law applies. It is now too late in the day to question the right of a female to succeed to an *Archaka* office. *Ramasundaram Pillai* v. *Sundarathammal* [3].

The Court delivered the following

Judgment :—The only question raised in this second Appeal is whether a female heir is disqualified from succeeding to the office of *Archaka* and receiving the emoluments attached to the office in cases where such office is hereditary in her family. The District Munsif passed a decree in plaintiff's favour but the Subordinate Judge who agreed with the District Munsif in all his findings of fact, dismissed the plaintiff's suit on the ground that

1. (1880) I. L. R. 3 M. 95.
2. (1877) I. L. R. 2 C. 365
3. (1914) 16 M. L. T. 423.
4. (1882) I. L R. 9 C. 766.

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the decision in *Sundarambal Ammal* v. *Yogavana Gurukkal* [1] was authority for holding that females were disqualified from succeeding to the office.

The right of females to succeed to religious offices and perform the duties by proxy where such offices are hereditary has been recognized in numerous cases. As observed by Justices Ayling and Hannay in *Ramasundaram Pillai* v *Savundrathammal* [2] (where all the important cases are collected) the rule enunciated by *Sadasiva Aiyar, J.* in *Sundarambal Ammal* v. *Yogavana Gurukkal* [1] runs counter to ideas which have been commonly accepted by parties concerned and given effect to by courts for many years and we think that the present case is one where courts should apply the doctrine of *stare decisis* and not declare to be illegal a practice which has been followed for many years with, so far as we are aware, no serious evil consequences and which has been the foundation of many titles.

The hereditary right to succeed to a religious office is itself the creature of custom and the fact that females have been allowed without question to enjoy the emoluments of the office and to get the duties performed by proxy and that courts have for a series of years given effect to such right, justifies us in holding that female succession is not excluded. The right of females to perform religious duties by proxy is not unknown to Hindu Law and usage, the commonest examples being the performance of *sradhas* and funeral obsequies by female heirs by proxy and cases where a widow makes an adoption.

In *Tangirala Chiranji* v. *Raja Manikya* [3] Justices Benson and Sundara Aiyar held that there was no basis for the assumption that females are as such disqualified from succeeding to a religious office attached to a temple and that the *onus* would be on the Dharmakarthas, to prove any such disqualification as services in temples are often performed by proxies. They were dealing with a case where the service to be performed was the reciting of Vedas in a temple and we can see little difference between such a service and the service performed by *Archakas*. The Subordinate Judge was wrong in thinking that any special custom has to be pleaded to enable a female heir to succeed. The *onus* is on those who deny her right to prove a custom excluding females.

1. (1914) 26 M. L. J. 315.
2. (1914) 16 M. L. T. 423.
3. (1914) 27 M. L. J. 179.

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In *Mahamaya Debi* v. *Haridas Haldar* [1] which was a case relating to an office in the Kalighat temple similar to that of *Archakas* in this Presidency, Justice Mookerjee after an elaborate review of several authorities was of opinion that the custom whereby females not only succeeded to the office but also alienated the same was not invalid as opposed to public policy. An alienation was also upheld in *Kakrannaya* v. *Padayaya* [2]. It is unnecessary for us in the present case to decide how far the right of alienation extends though there is authority for holding that a female heir can alienate the office to one next in succession. So far as the authorities go, we do not think that there is any ground for refusing to recognise the custom of female succession to hereditary religious offices on the ground of such a custom being opposed to either to the express text of Hindu Law or to Public Policy.

Following *Ramasundaram Pillai* v. *Savundrathammal* [3] and *Tangirala Chiranjivi* v. *Raja Manikya Rao* [4], we are of opinion that a female is not under Hindu Law or custom, disqualified from succeeding to a hereditary religious office and getting such duties as she may be disqualified by reason of her sex from performing, performed by proxy.

We reverse the decision of the Subordinate Judge and remand the case to him for disposal of the second question raised by him. The respondents will pay appellant's costs in this Court and the costs of the Sub-Court will abide and follow the result.

PRIVY COUNCIL.

Present :—Earl Loreburn, Viscount Haldane and Lord Wrenbury.

[On appeal from the Court of Appeal for Eastern Africa.]

Abdurahim Haji Ismail Mithu ... *Appellant* *

v.

Halimabai ... *Respondent.*

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Abdurahim Haji Ismail Mithu *v.* Halimabai.

Hindu Law—Mahomedan Law—Memons—Succession—Custom—Settlement—Succession domicil—Analogy.

Where a Hindu family migrate from one part of India to another, *prima facie* they carry with them their personal law and if they are alleged to have become subject to a new local custom, this new custom must affirmatively be proved to have been adopted ; but when such a family emigrate to another country and being

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* 3rd December 1915.

1. (1915) I. L. R. 42 C. 455.
2. (1909) 8 M. L. T. 325.
3. (1914) 16 M. L. T. 423.
4. (1914) 27 M. L. T. 179.

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themselves Mahomedans settle among Mahomedans the presumption that they have accepted the law of the people whom they have joined is one that should be much more readily made and all that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environments.

Appeal from a Judgment and decree of the Court of Appeal for Eastern Africa dated March 6, 1914 reversing the Judgment and decree of the High Court of East Africa at Mombosa, dated 16th September 1913.

The facts of the case are sufficiently set forth in their Lordship's Judgment.

Sir E. Richards, K.C. and Austin Cartnell for the Appellant.

Among Memons the original and ordinary law by which succession of interests was governed is and has always been the Hindu Law. The presumption would be that even at Mombasa they would be governed by the Hindu Law and could only be replaced by a special custom or usage modifying or rebutting this presumption. This custom must be ancient and invariable and established by clear and unambiguous evidence. The *onus* of proving that the parties were governed by the Mahomedan Law was on the respondent and was not discharged.

Reference was made to *Perry's Oriental Cases* [1], *Khoja and Memon's Cases* [2], *Hirbai* v. *Gorbai* [3], *G. Ahmedbhoy* v. *Hubibhoy* [4], *Soorendranath Roy* v. *Heramonee Burmoniah* [5], and *Abraham* v. *Abraham* [6].

The Respondent did not appear.

The Judgment of their Lordships was delivered by

Viscount Haldane:—This is an appeal from a Judgment of the Court of Appeal for Eastern Africa reversing a Judgment of the High Court of East Africa at Mombasa. The question to be decided is whether the succession to the estate of one Haji Ismail Mithu, deceased, is governed, as the appellant, who is a son, claims, by Hindu Law, or whether such succession is governed by Mahomedan Law, as the respondent, who is the widow, asserts. This question arose in an action brought by the respondent against the appellant claiming administration and a declaration that she was entitled, on the footing that Mahomedan Law applied, to an eighth of her husband's estate. On the appellant's contention the respondent, as widow of the deceased, became entitled to no more than maintenance.

1. (1847) p. 110.
2. (1905) I. L. R. 30 B. 197.
3. (1874) I. L. R. 12 B. H. C. R. 294.
4. (1887) I. L. R. 12 B. 280.
5. (1867) 12 Moo. I. A. 81.
6. (1863) 9 Moo. I. A. 195.

The deceased was a merchant who had settled at Mombasa, and was a member of the Indian sect known as Memons. According to the case as stated by the appellant's Counsel, some 400 or 500 years ago the "Luwanas," a sect of Hindus located in Scinde, became converted to the Mahomedan faith and took the name of Memons. A century or so later they migrated to Cutch, where they settled. There were two migrations. Those who first migrated, and their descendants became known as Cutchee Memons; while those who migrated on the second occasion, and their descendants, were called Nassapooria Memons. Both sets of migrants held to religious tenets and customs which are common to the Memon community, and for the purposes of the present appeal, the distinction between the two sets is immaterial.

Upon their conversion to Mahomedanism the Memons did not adopt the Mahomedan Law as to succession, but retained the Hindu Law of succession as a customary law which remained binding upon the entire Memon community at Cutch. Over half a century ago Memons began to migrate from Cutch to East Africa, and there are now, so it is stated, at least a hundred Memon families at Mombasa.

The deceased's father was a Nassapooria Memon who about half a century ago, with his wife and children, including the deceased, migrated to Mombasa, where they settled. At Mombasa the succession to Mahomedans is in general governed by Mahomedan Law, although it would probably be open to immigrants to prove that they have brought with them and preserved a custom establishing special law of succession.

The action was tried before Hamilton, C. J. The appellant and respondent both called evidence. It was shown that in some cases, of which eleven appear to have fully proved, succession among the members of the Memon community at Mombasa had taken place according to Mahomedan Law. The only documentary evidence was also in accordance with this view. On the other hand, oral evidence was given for the appellant and accepted by the learned Judge who tried the case which showed that in a few cases distribution in accordance with Hindu Law had taken place. It was also established that there had been a custom, or at least a practice, that ornaments given to a wife in her husband's lifetime were allowed to remain with the widow only during her life or until remarriage,

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a custom or practice more nearly resembling the rule which obtains among Hindus than any which regulates such cases among Mahomedans. Upon consideration of the evidence Hamilton, C. J., decided in favour of the appellant. He took the view that the burden of proof lay on the respondent to show that there was a Mahomedan custom which applied to the Memons in Mombasa, that this custom was ancient and invariable, and that it had superseded the custom which governed the Cutch Memons in such cases before migration.

The Court of Appeal were of a different opinion. They held that Hamilton, C. J., had, having regard to the facts as established, wrongly stated the character of the burden of proof. They took the view that if the present respondent simply produced sufficient evidence to show that the custom of Hindu succession had ceased to be generally observed by the Memons in Mombasa, that was sufficient to entitle her to succeed, if the other side failed to bring forward sufficient evidence in answer. They commented on the indications, adverse to the present appellant, furnished by the documentary records, and on what they considered to be on the whole the preponderance in trustworthiness of the oral evidence against him. That on certain occasions females should have been proved to have preferred maintenance to a share of a very small estate they regarded as in the circumstances inconclusive; nor was the special custom or practice as to ornaments enough to displace the presumption that the general rule was that of Mahomedan Law.

Their Lordships are in agreement with the conclusions reached by the Court of Appeal for Eastern Africa. It seems to them that the learned Judge who tried the case misconceived what, having regard to the circumstances of the Memon migration to Mombasa, was the real question for the Judge who had to try the case.

Where a Hindu family migrate from one part of India to another, *prima facie*, they carry with them their personal law, and, if they are alleged to have become subject to a new local custom, this new custom must be affirmatively proved to have been adopted, but when such a family emigrate to another country, and, being themselves Mahomedans, settle among Mahomedans, the presumption that they have accepted the law of the people whom they have joined seems to their Lordships to be one

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that should be much more readily made. All that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environments. The analogy is that of a change of domicile on settling in a new country, rather than the analogy of a change of custom on migration within India. The question is simply one of the proper inference to be drawn from the circumstances. In the present case it is to be observed that it does not appear that the Memons in Mombasa have at any time established any distinctive political or social organisation for themselves. Such organisation as has been formed appears to have been formed mainly, if not entirely, for purposes of worship. There seems to be no sufficient reason in what has been brought before the courts in this case for regarding the Memons who have emigrated from Cutch to Mombasa as other than a number of individual Mahomedans who have settled down among a people who are of their own religion. It does not appear that these Memons have ever as a body claimed to be outside the system of law which naturally follows from that religion, and so prevails among the Mahomedans at Mombasa. Their Lordships have examined the oral evidence brought forward on behalf of the appellant. It relates to very small estates and is of an inconclusive character. There is lacking in it indication of intention to assert a, principle. A good deal of the evidence for the respondent is open to the same observation. But several of the documentary records distinctly support the contention that some at least of the Memon families had treated themselves as governed in point of succession by Mahomedan law, and the balance of the oral testimony, appears to be on this side. Under these circumstances their Lordships think that the presumption which arises from the facts proved, and the weight of evidence are both in favour of the conclusion reached by the Court of Appeal.

They will, therefore, humbly advise His Majesty that this appeal should be dismissed.

Solicitors :—*Harrison, Powell and Tulk.*

PRIVY COUNCIL.

Present:—Viscount Haldane, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the Chief Court of Lower Burma.]

The Bank of Bengal ... *Appellants**

v.

Ramanathan Chetty and others ... *Respondents.*

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The Bank of Bengal *v.* Ramanathan Chetty.

Agency—Power of attorney—Power—Construction—Power to borrow—Power to pledge credit of firm—Express or by necessary implication—Liability of Principal—Inference—Non-production of account books—Notice—Not calling agent as witness.

Where the agent of a Chetti money lending firm at Rangoon had pledged the credit of the firm to secure an advance for a client by a Bank, the power of the agent to enter into such transactions being questioned,

Held, that on a fair construction of the power of attorney and in view of the nature of the business the agent had power by necessary implication to enter into the transaction in question, as without such authority it would hardly have been possible to carry on the business of a money lender and financier.

Bryant, Powis and Bryant, Ld., v. *La Banque du Peuple* [1], applied.

The authority to borrow implied an authority to pledge the credit of the firm.

If the authority of the agent is established, the mere fact that the principal did not derive any benefit from the transaction does not rid him of his liability.

Appeal from a Judgment and decree of the Chief Court on its Appellate Side dated March 26, 1914 reversing a Judgment and decree of the same Court on its Original Side dated August 16, 1912.

The facts of the case are sufficiently set forth in their Lordships' Judgment.

Sir E. Richards, K. C. and *Coltman* for the Appellants.

The respondents are clearly liable on the contiact of guarantee. The agent had power to endorse the promissory note and execute the guarantee agreement. He need not have express power to act in that way. It is sufficient if he could not carry on his duties without such powers. In other words he had the power by necessary implication. The firm was a money-lending firm and therefore guaranteeing loans and overdrafts would fall within the scope of its business. The presumption by the non-production of the account books after due notice is that the said agent had acted on more than one occasion as a guarantor and his action was ratified by the firm. In fact the respondents held out their agents as having authority to enter into guarantees and ratified their action in so doing.

Reference was made to *Bryant, Powis and Bryant, Ld.*, v. *La Banque du Peuple* [1] Indian Evidence Act, S. 114 Indian Contract Act, S. 187 Presidency Banks Act (XI) of 1876, Chapter 8 S. 36-a (6) amended by Act I of 1907, S. 37 Cl. e.

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* 16th December, 1915. 1 (1893) A. C. 170, 177.

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The Bank of Bengal v. Ramanathan Chetty.

Newbolt, K. C. and *Sanders* for the Respondents:—The respondents never authorised Chockalingam by the power of attorney or otherwise to enter into the guarantee on behalf of Ebrahim. There was no evidence on record that guaranting accounts fell within the scope of a Chetty money lender and even then such evidence would not have been admissible. There is no evidence that Chockalingam ever gave a guarantee for any other person than Ebrahim or that the respondents knew that the agent aforesaid ever gave a guarantee for any debtor or subsequently ratified the same.

Reference was made to *Jacobs* v. *Morris* [1] *Jacobs* v. *Morris* [2] *Bryant, Powis, and Bryant, Ltd.*, v. *La Banque du Peuple* [3].

The Judgment of their Lordships was delivered by

Mr. Ameer Ali:—This is an appeal from the Chief Court of Lower Burmah, and the sole question for determination is whether the agent in Rangoon of the original defendant to the action, Lutchmanan Chetty, since deceased, now represented by the respondents, had authority to enter into the transaction with the plaintiff bank on the basis of which it seeks to enforce the present claim against the principal.

Lutchumanan Chetty was a native of Madras, and ordinarily resided there. He belonged to the well-known Chetty money-lending caste, and had a large and apparently lucrative money-lending business in Rangoon, which he carried on by agents, under the name and style of "Ana Roona Laina," or shortly "A. R. L. Chetty." Previous to 1904 he had two partners, but after the death of one and the retirement of the other in that year, he was the sole owner of the business.

By a power of attorney dated the 24th of October 1904, he appointed one Ramaswamy Chetty, described in the document as "at present of Rangoon," as his attorney under "the style or firm of Ana Roona Laina or A. R. L. Ramaswamy Chetty." On the 15th of May 1905 Ramaswamy, by the power reserved to him in his appointment, substituted in his place one Chockalingam Chetty "as the attorney and agent" of the defendant. And since his appointment Chockalingam admittedly has managed

1. (1902) 1 Ch. 816. 2. (1901) 1 Ch. 261.
3. (1893) A. C. 170, 177.

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the entire money-lending business of the defendant's firm in Rangoon.

The transaction which forms the basis of the present claim was entered into in May 1908. It appears that about this time one Hassum (or Hashim) Ebrahim, with whom Chockalingam had previous dealings and who was evidently a constituent of the firm, applied to him for financial assistance. He acceded to the request, and the arrangement that was come to between them was in substance this, that Chockalingam should pledge the firm's credit with the plaintiff bank to enable Ebrahim to have a cash credit account opened in his name and obtain from the bank advances not exceeding in the aggregate Rs. 50,000, and that to secure the due repayment of this amount with interest thereon he should execute a promissory note in favour of the defendant's firm which Chockalingam on his side should endorse over to the bank.

It is to be observed in this connection that under the provisions of the Presidency Banks Act (XI of 1876, S. 37, cl. *e*), the bank is precluded from opening cash credits on the security of any negotiable instrument of :—

"any individual or partnership firm . . . which does not carry on it the "several responsibilities of at least two persons or firms unconnected with each "other in general partnership."

It was in view of this provision of the law, and the practice of the bank in conformity therewith, that the promissory note for Rs. 50,000, bearing the usual bank rate of interest, was executed on the 23rd May 1908, by Ebrahim in favour of "A. R. L. Chockalingam Chetty," the name under which the defendant's firm admittedly carried on business in Rangoon. This note was endorsed over by Chockalingam to the Bank. Thus both Ebrahim and the Chetty firm became severally liable on the note, one as the drawer, the other as the endorser, for advances to Ebrahim on his cash credit account.

At the same time and on the same date Chockalingam gave to the plaintiff bank a letter of guarantee on behalf of his firm. It stated the nature of the transaction and the character of the obligation undertaken by the Chetty firm in these terms :—

"In consideration of the Bank of Bengal having agreed at our request to grant "to Hassum Ebrahim (who is hereinafter referred to as the Borrower) accomoda-"tion by way of Cash Credit to such an amount from time to time as the Bank in "its discretion shall think proper upon condition that such Cash Credit shall to "the extent of Rs. 50,000 and interest be secured by the Promissory Note herein-"after mentioned we the undersigned A. R. L. Chockalingam Chetty (Guarantor)

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"have delivered to the Bank of Bengal a Promissory Note dated 23rd May 1908 "for Rs. 50,000 and interest payable on demand made by the said Borrower in "favour of us and endorsed by us to the said Bank or order (the said Promissory "Note being intended as a guarantee to the extent of Rs. 50,000 and interest of the "balance from time to time due to the said Bank from the said Borrower on "account of the said Cash Credit) on the understanding that the Bank shall be at "liberty to take steps to enforce payment of the said Promissory Note at any time "after notice in writing demanding payment thereof posted to us at our usual or "last known address and default being made in payment for three days after the "posting of such notice."

Ebrahim appears to have drawn considerable sums of money on the cash credit account thus opened. He was adjudicated an insolvent shortly after, and his assets vested in the official assignee. He himself is said to have absconded.

The plaintiff bank thereupon called upon the defendant to pay the amount due from Ebrahim, and on his failure to do so, brought the present action in the Chief Court of Lower Burma in its original civil jurisdiction. The defence to the action in the main is the denial of authority on the part of Chockalingam to enter into the transaction so as to bind the defendant's firm.

The case was at first heard *ex parte*, owing to the default of the defendant to enter appearance, but the *ex parte* decree was set aside, and the suit came on for trial as a contentious cause on the 17th January 1912, before Ormond, J., who framed the issues and took part of the evidence. It was heard subsequently by Robinson, J. The defendant, besides putting in the power of attorney and the instrument substituting Chockalingam in place of Ramaswamy, adduced no evidence; and Robinson, J., held in substance that, although there was no express authority to the agent to enter into a transaction of this nature the defendant subsequently ratified and confirmed the act, and was therefore clearly liable. He accordingly decreed the plaintiff's claim. The Appellate Court did not agree with this view. The learned Judges further considered that if guaranteeing the loans of others was to be regarded as "a necessary incident of the business, it would "not be so much a money-lending business as an insurance "business."

They accordingly dismissed the suit.

In their Lordships' opinion this Judgment cannot be supported. The learned Judges seem to have missed the real point at issue. They do not appear to have correctly apprehended the character and extent of the powers entrusted to the

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agent, or the nature of the business which he conducted and managed on behalf of the defendant in Rangoon.

Their Lordships desire to refer shortly to the principal provisions of the power directly bearing on the question raised in the case. After setting out that he was formerly carrying on the business of "bankers and money-lenders in Rangoon" in co-partnership with two other persons, and that owing to the death of one partner and the retirement of the other, he was then "solely carrying on the same business" under the style of A. R. L. Chetty, and that he was desirous of appointing Ramaswamy Chetty as his attorney for the general management of his said business, the defendant (Lutchmanan Chetty) proceeds to state the duties with which he charges the agent and the powers he entrusts him with:—

"To transact, conduct, and manage all and every or any of the affairs, "concerns, matters, and things in which I, the said L. A. R. L. Lutchmanan "Chetty, now am or hereafter may be in any wise interested and concerned, and "for that purpose to use or sign my name to all and every or any documents or "document writings or writing whatsoever. To borrow money from any bank or "banks, firm or firms, person or persons, either with or without pledge of securi- "ties for moneys advanced to various persons."

The authority to borrow is given in explicit and the broadest terms, "either with or without pledge of the securities" lodged with the agent by constituents for moneys advanced to them.

The power then goes on to declare:—

"To make, draw, sign, accept, endorse, negotiate and transfer all and every or "any Bills of Exchange, Promissory Notes, Hundis, Cheques, Drafts, Bills of "Lading and all and every other negotiable securities whatsoever to which my "signature or endorsement may be required or which my said attorney may in his "absolute discretion think fit, to make, draw, sign, accept, endorse, negotiate and "transfer in my name and on my behalf."

It is to be borne in mind that the defendant's business was a general money-lending business, in the course of which he financed both Chetties and non-Chetties. The agent had express authority to borrow. For what purpose? To lend to others. It was an essential incident of the business; and the authority to borrow implied an authority to pledge the credit of the firm for the purpose of obtaining or securing advances from others to constituents. It was a matter of convenience that, instead of receiving the money directly himself and lending it to the borrower, he authorised the lender, in this case the bank, on the pledge of the firm's credit, to advance the money to the borrower. Applying to the power in the present case the canon of construc-

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tion laid down in *Bryant, Powis and Bryant, Ld.*, v. *La Banque du Peuple* [1], *viz.*—"that where an act purporting to be done under "a power of attorney is challenged as being in excess of the "authority conferred by the power, it is necessary to show "that on a fair construction of the whole instrument the "authority in question is to be found within the four "corners of the instrument, either in express terms or by neces- "sary implication," their Lordships consider that the authority to enter into transactions of the nature in dispute is to be found in the document itself by necessary implication from the nature of the business, with the general management of which the agent was entrusted. Without such authority it would hardly have been possible to carry on the business of a money-lender and financier.

It is clear from the facts proved in the case that for three years it was accepted, and business was transacted on the basis, that the agent was invested with full authority in that behalf. For between May 1905 and May 1908 Chockalingam entered into twenty-three identical transactions without, so far as appears on the record, any question being raised that they were in excess of his authority. Besides, there is evidence that among these Chetty money-lending firms it is the practice for the agent to pledge the credit of the principal in this manner.

It was urged on behalf of the defendant that it was not shown he had received any benefit from the transaction in question. Their Lordships think that if authority is established the mere fact that the principal did not receive any benefit does not rid him of his liability. But it is to be observed that the case of the plaintiff bank was that the defendant's books of accounts would show receipt of commission on the transaction. It called upon the defendant to produce those books, which he failed to do; nor was Chockalingam called to support his allegation in respect of the non-receipt of commission.

Their Lordships are of opinion that the decree of the Chief Court should be set aside, and that of Robinson, J., should be restored. The respondents must pay the costs of this appeal and of the appeal in the Chief Court.

And their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellants:—*Arnold and Son.*

Solicitors for Respondents:—*Bramall and White.*

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1. (1893) A. C., 170, 177.

PRIVY COUNCIL.

Present:—Viscount Haldane, Lord Parmoor, Lord Wrenbury, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the High Court at Calcutta.]

Amir Chand ... *Appellant* *

v.

Bakshi Harihar Prashad Singh and others ... *Respondents*.

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Amir Chand *v.* Bakshi Harihar Prasad Singh.

Civil Procedure Code, (Act XIV) of 1882—*S.* 244—*Objections—Execution—Decree—Suit—S.* 88 *and* 89 *of Transfer of Property Act of* 1882—*Mortgage.*

On March 29, 1888 one Bakhshi Ram Nawaz Singh obtained a decree for sale under S. 88 and 89 of Transfer of Property Act against Fakir Chand and others. On May 18, 1904 certain objections were raised against the execution of the said decree of Bakhshi Nawaz, by Amir Chand, the adopted son of Fakir Chand under S. 244 of Civil Procedure Code of 1882, some of which were disallowed; on January 23, 1907 Amir Chand brought a suit raising the same objections as in 1904 making two other persons parties only to avoid the bar of S. 244, Civil Procedure Code, there being no foundation by reliable legal evidence for making new parties to the suit.

Held, that the suit was barred by S. 244 of Civil Procedure Code, of 1882, *Prosunno Coomar Sanyal* v *Kasi Das Sanyal* 1 approved.

Appeal heard *ex parte* from a Judgment and decree of the High Court dated December 20, 1909 reversing a Judgment and decree of the Court of the Subordinate Judge of Arrah dated June, 29 1908.

The facts of the case are sufficiently set forth in their Lordships Judgment.

Dube for the Appellant referred to Ss. 85 and 89 of the Transfer of Property Act and S. 287 of the Civil Procedure Code of 1882 and contended that there was a lien irrespective of the decree.

Lord Haldane referred to *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal* 1.

The Respondents did not appear.

The Judgment of their Lordships was delivered by

Sir John Edge:—The plaintiff in the suit in which this appeal has arisen is Babu Amir Chand, the adopted son and representative of Babu Fakir Chand, deceased. On the 29th March, 1888 one Bakshi Ram Newaz Singh obtained a decree for

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* 25th November 1915.

1. (1892) L. R. 19 I. A. 166

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sale, under S. 88 of the Transfer of Property Act, 1882, (Act IV of 1882,) of certain immovable property of which he was a mortgagee. To the suit in which that decree was made Babu Fakir Chand was a defendant. An order absolute for sale, under S. 89 of that Code was made in the suit for sale on the 4th January 1902 by the Trial Judge, and was confirmed on appeal by the High Court at Calcutta on the 18th December 1903. The representatives of Bakshi Ram Newaz Singh thereupon applied for execution of the decree for sale. On the 18th May 1904 Babu Amir Chand, who was the representative of Babu Fakir Chand then dead, presented to the Court executing the decree for sale a petition of objections under S. 244 of the Code of Civil Procedure, 1882, Act XIV of 1882. Some of Babu Amir Chand's objections were allowed, others of his objections were disallowed on the ground, amongst others, that he had failed to support them by sufficient evidence.

On the 23rd January 1907 Babu Amir Chand filed his plaint in the present suit in the Court of the Subordinate Judge of Arrah. In this suit he raises the same objections to the execution of the decree for sale of 1888 which had been put forward in his petition of objections of 1904 and which had been disallowed. The Subordinate Judge decreed in part the claims of Babu Amir Chand. On appeal the High Court at Calcutta on the 20th December 1909, holding that this suit is based on the very same objections that were made by Babu Amir Chand in his petition of objections of 1904, and further, finding that Babu Amir Chand had laid no foundation by reliable legal evidence for impleading in this suit Abdur Razak and Gangan Kunwar, who were not parties to the previous suit or execution proceedings, dismissed this suit. From that decree of the High Court this appeal has been brought.

Abdur Razak and Gangan Kunwar were made defendants to this suit in an attempt to avoid the bar to this separate suit which was provided by S. 244 of the Code of Civil Procedure, 1882.

As was observed by this Board in *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal* [1].

"It is of the utmost importance that all objections to execution sales should "be disposed of as cheaply and as speedily as possible. Their Lordships are glad "to find that the Courts in India have not placed any narrow construction on the "language of S. 244 of the Code of Civil Procedure, 1882."

I. (1892) L. R. 19 I. A. 166.

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The questions raised in this suit could have been and were raised by Babu Amir Chand under S. 244 of the Code of Civil Procedure, 1882, and whether then raised or not in his petition of objections of 1904, they are questions which relate to the matters which by S. 244 it was enacted—

"Shall be determined by orders of the Court executing a decree and not by "separate suit."

The suit was properly dismissed by the High Court. The respondents, with one exception, have not entered an appearance in this appeal.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

The appellant must pay to the respondent who has entered an appearance such costs as he may be entitled to.

Solicitors for Appellant:—*Barrow, Rogers & Nevill.*

Ramanathan Chetty v. Yegappa Chetty.

Coutts Trotter, J.

C. V. Anantakrishnaiyar in reply referred to *Chidambaram Chetty* v. *Ramasami Chetty* [1] *Arunachellum, Agent of Chartered Bank* v. *Velliappa Chetty* [2].

The Court delivered the following

Judgments:—*Coutts Trotter, J.*--This was a suit for dissolution of partnership. The partnership was entered into in 1902 or 1903 between the plaintiff, the 1st defendant, the 5th defendant and one Subramanian Chetti. The sole question we have to determine is whether this suit for dissolution which was launched on the 12th March 1912 is or is not barred by limitation, the period of limitation in such cases being 3 years. Various points of time were suggested when it was said that the plaintiff's cause of action arose but, in my opinion it is sufficient to confine our attention to the year 1908 when Subramanian Chetty died. It is clear that if on his death, the cause of action arose, plaintiff's suit cannot be in time. *Prima facie* one would suppose that if a person who was a partner in a firm died, the partnership would stand dissolved. But it is contended on behalf of the appellant that the ordinary rule of law is not applicable to cases where the partner who dies is a member of an undivided Hindu family and where it is to be supposed that he enters into the partnership in his capacity as a member of the undivided family to which he belongs with the intention of creating an interest in the partnership business for his family as a whole. One may take the case of a partner who is the managing member of his family. Then on this doctrine the family as a whole becomes a member of the partnership firm. In that case the death of the particular individual who happened to join the partnership and take part in its affairs is quite irrelevant, because the family still subsists as an entity. It is the family that is the partner and therefore there is no alteration of the *personæ* composing the partnership. Such a doctrine would, of course, cause commercial inconvenience of the most extreme type. I do not think anybody would doubt that.

The question is whether it can be supported in law. Chief reliance was placed on a Judgment of the Privy Council delivered by Lord Shaw reported in *Joopoody Surayya* v. *Lakshmanaswamy* [3] It appears from the report that the matter was not touched up on either in the argument of the appellant or that of the respondent. The decision of the Privy Council was one

1. (1914) 27 M. L. J. 631. 2. (1914) 27 M. L. J. 654.
3. (1913) I. L. R. 36 M. 185 at 192.

Ramanathan Chetty v. Yegappa Chetty.

Coutts Trotter, J.

which confirmed the Judgment of this Court on the facts and held that a certain partnership which was the subject of that case had been dissolved in the year 1891 and did not, as the appellant contended, subsist after that date. The main fact which appears to have carried weight with their Lordships was that in 1891, final accounts of the partnership were taken in a way in which they were never taken before and that after that date no partnership accounts of profits and losses were made up at all, and they also considered the fact that there was almost simultaneously a division of the family property which rendered it very likely that there had been at the same time a dissolution of the partnership. The particular passage in the judgment relied upon by the appellant's counsel in support of his contention is "Different *personae* had arisen in law and with these it was open to Venkanna to say whether he should be allied in partnership or not." It is said that this sentence suggests that whenever there is "partition as between the members of a joint Hindu family *ipso facto* there is a dissolution of any partnership in which the family is interested by reason of the fact that it removes from the partnership a large number of persons and it is argued that conversely, it must be held that so long as the family is not divided so long the partnership subsists. Mr. Krishnaswamy Aiyar for the respondents suggested various ways of interpreting this sentence so as to give it a different meaning from that suggested by the appellant's counsel. I think it is quite wrong to take a sentence of the judgment and to build upon it so startling a doctrine as that of the appellant's. I do not think that there can be anything less likely to commend itself to their Lordships of the Privy Council than such a course. The matter was not necessary to be decided nor had it been argued. I do not think a casual sentence ought to be made the foundation of a whole legal doctrine. I should add that the matter so far as this Court is concerned is settled because in *Sokkanadha Vanni Mundar* v. *Sokkanadha Vanni Mundar* [1], Mr. Justice Subramaniya Aiyar and Mr. Justice Boddam definitely decided against this contention. I agree with their reasoning and I am not in the least prepared to say that this single sentence in the Judgment of the Privy Council must be taken as impliedly overruling their considered Judgment on this point.

1 (1904) I. L. R 28 M. 344.

Ramanathan Chetty v. Yegappa Chetty.

Coutts Trotter, J.

I am therefore of opinion that though doubtless where the manager of a joint Hindu family is a member of a trading partnership, there may be many cases in which the family property may in one way or other be available to the creditors of the partnership, yet the family as such is not a trading partner, the partner being the person who entered into the agreement of partnership and conducted the partnership business as a partner. To my mind, it is not only a misnomer but also a confusion of thought to argue that the joint family is a member of the partnership. The partner is the person who actually enters into an agreement with other persons. That being so and there being no evidence at all of any new partnership after the death of Subramanian Chetty, because no business was done at all after the death of Subramania other than the taking of accounts, the partnership, as I have already said, terminated. I agree with the Lower Court in holding that the suit is time barred.

The appeal fails and is dismissed with costs.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—I agree that the appeal fails. The precise question in this case was decided in the case of *Sokkanadha Vanni Mundar* v. *Sokkanadha Vanni Mundar* [1]. We are bound by that decision and if I may respectfully say so I entirely agree with the reasoning in that Judgment. I do not think that an ambiguous sentence in the Judgment of the Privy Council should be taken as overruling the considered Judgment of this Court in *Sokkanadha Vanni-Mundar* v. *Sokkanadha Vanni Mundar* [1] which is not referred to in the case in the Privy Council. It is unnecessary to say anything more in this case as I think we are concluded by that Judgment.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Napier.

Subramaniyan Chettiar .... **Appellant (1st Defendant)*

v.

Kadiresan Chettiar and others ... *Respondents (Plaintiffs and Defendants 2 to 6.)*

Limitation Act, Art. 59, 60—Deposit meaning of—Money entrusted by agent with principal—Nature of—Art applicable.

* S. A. No. 737 of 1913. 19th January 1916.

1. (1904) I. L. R. 28 M. 344.

Subramaniyan Chettiar v. Kadiresan Chettiar.

Where money belonging to plaintiff was left with the defendant's firm on the understanding that interest should be paid on it at the current rate and that the plaintiff should be at liberty to draw against it as he required money.

Held, that it was a case of deposit to which Art. 60 applied.

Money in the hands of a trader who is not a banker will be a deposit in circumstances such as would make it money of a customer where the depositee was a banker.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Ramnad at Madura in A. S. No. 234 of 1912 preferred against the decree of the Court of the District Munsif of Paramakudi in O. S. No. 826 of 1910.

V. K. Srinivasa Aiyangar for *C. S. Venkatachariar* for Appellant.

K. V. Krishnasawmi Aiyar for Respondents.

The Court delivered the following

Napier, J.

Judgments:—*Napier, J.*:—The question raised in this second appeal and in the connected Second Appeal No. 738 of 1913 is, whether certain sums claimed by the plaintiff in each case from the defendant firm are "money deposited" within the meaning of Art. 60 of the present Limitation Act. The Lower Appellate Court has held that they are, but we are asked to hold that there is no evidence to support that finding. The Second Appeal No. 737 of 1913 is to recover Rs. 817-1-9 alleged to be due to the plaintiff as balance of principal and interest due in respect of two sums deposited by him. The first amount was Rs. 550 given to the defendants on October 17, 1905, prior to his entering their service as an assistant, which he did on March 3, 1906. The second sum was Rs. 526-12-0, which represents half the salary of the defendant for the whole three years of his service, and credited by him to himself on joining the service. No cash was taken out or returned by the plaintiff but it is proved that, according to the custom of these traders the plaintiff was entitled to take that amount and deal with it as he wished. What he did was to leave it with the firm and draw against it as he required money. The Lower Appellate Court has found further that the agreement between the parties was that the account of both sums should be credited with interest at the current rate and should be payable on demand. It is contended for the appellants that the money is "money lent" within Art. 59 and the suit is barred by limitation. Reliance is placed on *Ichha Dhanji* v. *Natha* [1], *Dharam Das* v. *Ganga Devi* [2] and *Official Assignee*

1. (1888) I. L. R. 13 B. 338. 2. (1907) I. L. R. 29 A. 773.

Subramaniyan Chettiar v. Kadiresan Chettiar.

Napier, J.

of Madras v. Smith [1]. The Madras case is one of those arising out of the Arbuthnot Insolvency in which a large number of claims were made for preferential payment in respect of money in the hands of the firm. The Court had to decide the real legal character of the transaction between the banker and his customer and for that purpose laid down law—with which I respectfully agree—the basis of which is to be found in the two leading cases *Foley* v. *Hill* [2] and *In re Hallett's Estate* [3] lately reaffirmed by the House of Lords in *the Birkbeck Bank case*: *Sinclair* v. *Brougham* [4]. The law is as follows:—The true relation between a banker and his customer is that of debtor and creditor (*Foley* v. *Hill* [2]); but a customer who pays money to his banker under terms that they are not to use it, or who authorises his banker to collect money due to him on the like terms, constitutes a fiduciary relationship between himself and the banker and is entitled to recover the amount from the general assets of the banker, if the banker has committed a breach of trust, on the principle that all other payments must be assumed to have been made out of money in the banker's hands to which no fiduciary character attached, (*In re Hallett's Estate* [3]). It is contended for the appellants that on the admitted facts the present case is not within *In re Hallett's Estate* [3] and further that these principles must be applied in the construction of the articles of the Limitation Act and that what is in law and fact a loan could not be money deposited under Art. 60. This is undoubtedly the view taken in *Dharam Das* v. *Ganga Devi* [5] where the Court holds on facts very similar to those here, that Art. 60 is not intended to apply to a transaction which is in law a loan, and in *Ichha Dhanji* v. *Natha* [6] where the same language is used with the same result.

With great deference to the learned Judges the reasoning ignores the fact that if the term deposit is legally inapplicable to a loan it is also inapt for describing a trust of money and also that the word 'deposit' is familiar in banking parlance as describing money held by a banker for his customer on special terms as distinguished from current account, in both of which cases, however, the banker is intended to have the use of the money and no

1. (1903) I. L. R. 32 M. 68.
2. 2 H. L. C. 28.
3. (1880) 13 Ch. Div. 696.
4. (1914) A. C. 398.
5. (1907) I. L. R. 29 A. 773.
6. (1888) I. L. R. 13 B. 342.

Subramaniyan Chettiar v. Kadiresan Chettiar.

Napier, J.

trust arises. The contrary view is expressed in *Ishur Chunder Bhaduri* v. *Jibun Kumari Bibi* [1] where the Court held that Art. 60 must be construed with reference to the ordinary idea of the public as to the dealing with banks and by the language used by the bankers themselves in describing their balances held on account of customers. In a judgment which will repay careful examination, the learned Judges give good reasons for taking the view. The same view was taken by this Court in *Perundevi Tayar Ammal* v. *Nammalwar Chetty* [2] a case somewhat stronger than the Calcutta case in one respect, in that the depositee was not a banker but an ordinary shopkeeper and thus the position was much more like the present case, the only difference being that in *Perundevi Tayar Ammal* v. *Nammalwar Chetty* [2] the depositor is not shown to have been entitled to draw against the deposit, whereas in *Ishur Chunder Bhaduri* v. *Jibun Kumari Bibi* [1] he did draw. All these cases however are decided on words of the article in the Limitation Act of 1877 but the present Act has added the words "including money of a customer in the hands of a banker so payable." It must be admitted that the Legislature has not yet made the matter perfectly clear but it has definitely, and I think intentionally, used language in a non-legal sense. The money of a customer can only mean money paid in *the ordinary customary way of business.* Now, clearly when it passes into the banker's hands it is not the customer's money any longer. It becomes a debt due from the bank. I cannot but regard this language as throwing light on the meaning to be given to the word 'deposit' for it seems to me illogical to treat the word 'deposit' as inapplicable to what is in law a loan and yet be compelled to give a non-legal meaning to a phrase which is stated to be "included" in the word 'deposit'. We can, I think, only give full meaning to the language used in the present article by holding that money in the hands of a trader who is not a banker will be a deposit in circumstances such as would make it money of a customer where the depositee was a banker. For these reasons I am of opinion that the Judgment of the Lower Appellate Court is right and the Appeal must be dismissed with costs.

Ayling, J.—I agree.

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1. (1888) I. L. R. 16 C. 25.

2. (1895) I. L. R. 18 M. 390.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

Sri Raja Varadaraja Appa Rao Bahadur Zemindar Garu. ... *Appellant.* In all the Appeals (Plaintiff)*

v.

Katnani Kuruvana and others ... *Respondents. In A. A. O. No. 8 of 1913. (Defendants).*

Sri Raja Varadaraja Appa Rao Garu v. Katnani Kuruvana.

Madras Estates Land Act (I of 1908) Ss. 3, 2 (d) and (e) and 8, Exception—Scope of—Estate—'Person not owning the kudivaram *thereof', meaning of—Ejectment Suit—Jurisdiction—Civil or Revenue Court.*

An *agraharam* granted by a Zemindar from out of his estate and situate within the Zemindari limits, was excluded from the assets of the Zemindari at the time of the permanent settlement and was subsequently enfranchised at the Inam Settlement.

Held, that the *agraharam* was not an estate within the meaning of S. 3, (2) (e) of the Estates Land Act.

To remove a village from the definition of estate within the meaning of S. 3, 2 (d) of the Act, it is necessary that the grantee should at the time of the grant own the *kudivaram* of all the lands then brought under cultivation. In other words, a village will not cease to come under that clause merely because the grantee owned the *kudivaram* in certain lands included therein, even in so far as those lands are concerned.

The exception to S. 8 of the Estates Land Act has reference only to cases where a person who is already an Inamdar acquires the *kudivaram* right.

Appeals against the decrees of the District Court of Kistna at Masulipatam in Appeal Suits Nos. 84 to 88 of 1912, preferred against the decrees of the Court of the District Munsif of Bezwada in Original Suits Nos. 504 to 508 of 1910 respectively.

L. A. Govindaraghava Aiyar and *P. Nagabhushanam* for Appellant.

V. Ramadoss for Respondents.

The Court (Ayling and Oldfield, JJ.), delivered the following

Judgment† :—The only question for disposal by us is one of jurisdiction—whether these suits are cognizable by the Civil or Revenue Courts. This, in its turn, depends on whether the lands to which they relate form part of an 'Estate' within the definition given in S. 3 of the Madras Estates Land Act.

According to defendants (respondents) they fall within either clause (*d*) or clause (*e*) of the definition—S. 3 (2) of the Act. The District Judge holds that clause (*e*) is applicable and that the suits are not cognizable by a Civil Court.

* A. A. O. No. 8 to 12 of 1913. 9th December 1915.

† 16th April 1914.

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Herein we must hold him to be wrong. The present case cannot be distinguished from that of *Virabhadrayya* v. *Sonti Venkanna* [1] which was disposed of after the District Judge's decision and which we must follow. This is clear authority for holding clause (*e*) of the definition to be inapplicable to the present case.

Respondents, however, rely on clause (*d*), the applicability of which was considered but not decided by the District Judge and also on the exception to S. 8 of the same Act.

As regards clause (*d*) we may say at once that there appears to have been a grant 200 years ago of the land revenue of the village to the agraharamdars (to whose rights plaintiff—appellant has succeeded); and this grant was confirmed and recognised by the British Government by enfranchisement at the time of Inam Settlement. So far the definition applies. But, to make it entirely applicable, it is necessary that the grant should have been of the land revenue alone "to a person not owning the *kudivaram* thereof." It is in connection with the last words that the chief difficulty arises, though it is argued on behalf of appellant in the alternative that the grant may have included both varams. What does "thereof" mean? This has been the subject of consideration in more than one recent case in this Court—notably in *Suryanarayana* v. *Potanna*, [2] and *Ponnusamy Padayachi* v. *Karuppudayan*, [3] and most recent of all in a case, as yet unreported, decided by Sadasiva Aiyar and Seshagiri Aiyar, JJ. (C.M.A. No. 186 of 1911).* These cases, however, turned mainly on the existence of waste or unoccupied land in the village at the time of the grant and the question of the *kudivaram* or occupancy right in such land. With this difficulty we are not now concerned. But, we are clearly of opinion that to remove a village from the definition it is necessary that the grantee should at the time of the grant own the kudivaram of all the lands then brought under cultivation. In other words, a village will not cease to come under clause (*d*) merely because the grantee owned the *kudivaram* in certain lands included therein—not even in so far as those lands are concerned. As Seshagiri Aiyar, J., puts it in the latest case "what the legislature meant to lay down was that no *kudivaram* rights should have been granted in the lands which were under

1. (1915) 24 M. L. J. 659. 2. (1915) I. L. R. 38 M. 608=26 M. L. J. 99.
3. (1914) I. L. R. 38 M. 848=26 M. L. J. 285.

* [Since reported in *Venkata Sastrulu* v. *Sitaramudu*, (1914) 26 M.L.J. 585. Ed.]

Sri Raja Varadaraja Appa Rao Garu v. Katnani Kuruvana.

the occupancy of tenants; any other construction will lead to difficulties."

Now, in the present case, appellant contends that at the time of the grant, the Agraharamdars held the *kudivaram* of all the cultivable lands of the village. But the finding of the District Judge (which so far as it goes is not impugned) is merely to the effect that at the time of suit the tenants (respondents) had no occupancy rights in the suit lands. This may be taken as tantamount to saying that the appellant owned the *kudivaram* in those lands. But this as pointed out above, is insufficient to remove the case outside the definition of clause *(d)*.

It remains to consider the exception to S. 8, on which appellant relies in the alternative. This provides that where the *kudivaram* interest in any land comprised in an estate falling within clause *(d)* of S. 3 (2) is acquired by the Inamdar, such land shall cease to be part of the estate. Appellant claims the benefit of this proviso for the suit lands in case it is held that the Inam village falls within clause *(d)*. Mr. Govindaraghava Aiyar argues that it would apply even to cases where at any time before the passing of the Act, the *kudivaram* was held by a person who subsequently became, as Inamdar, possessed of the land revenue. We do not think the wording can bear this interpretation. It appears to have reference only to cases in which a person who is already Inamdar acquires the *kudivaram* right. He lays more stress however in the argument that as the *kudivaram* is now found to vest in the Inamdar, it follows that he either owned it at the time of the grant or acquired it since. In the former case he relies on clause *(d)*, in the latter on the exception to S. 8. In support of his argument he quotes the observations of Miller, J. in *Ponnusami Padayachi* v. *Karuppudayan* [1].

If, however, our interpretation of these provisions of law is correct, it does not follow that one or other of them must necessarily apply. It is conceivable that the Inamdar held the *kudivaram* of the suit lands at the time of the grant, but did not hold the *kudivaram* of other cultivated lands in the village. In that case neither would apply. With all deference to the weighty remarks of Miller, J. this contingency does not appear to have been presented to him and it may very well be that it did not arise in the circumstances of the case he was considering.

1. (1914) 26 M. L. J. 285.

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Mr. Govindaraghava Aiyar argues that our interpretation of the Act leads to the apparent anomaly that an Inamdar, who, at the time of grant, owned the *kudivaram* of certain lands in the village will be worse off as regards power to evict with respect to such lands than with respect to other lands of which he may subsequently acquire the *kudivaram*. Assuming this to be so, we do not think the anomaly is such as to justify us in straining the language of the Act beyond its natural meaning in order to avoid it. As the facts found are insufficient to enable us to determine the question of jurisdiction, we must call for a finding on the following issues :—

(1) "Did the original grant include the *kudivaram* of the village?"

(2) "Did the grantees enjoy the *kudivaram* rights in all cultivated lands in the village, at the time of the original grant?"

(3) "Did they or their legal representatives acquire *kudivaram* right in the plaint lands subsequent to the original grant and if so, when and how?"

Fresh evidence may be adduced on both sides.

The finding will be submitted within 31st of July 1914 and seven days are allowed for filing objections.

[In accordance with the order contained in the above Judgment, the District Judge of Kistna at Masulipatam submitted a finding the material portion of which are the following].

FINDING:—* * * * There is thus no direct proof that the Agraharamdars were granted *melvaram* and *kudivaram* rights in the village, (*i.e.*, that they obtained a grant of land and not of revenue) or that they held the *kudivaram* rights of all the cultivated lands in the village at the time of the grant but as such direct proof is not to be expected in the case of a grant made so far back as A. D. 1708, we must proceed upon inferences from facts which can be shown to have existed later and I am of opinion that issues 1 and 2 must be found in favour of the appellant (plaintiff) even if the burden of proof did not lie on the respondent as I hold it does. I therefore find that the grant must be presumed to have been one of land and not of revenue, that is to say, it included the *kudivaram* of the village and that if it was not a grant of land including the *kudivaram* of the village, it was because the grantees already possessed the *kudivaram* of such land as was already cultivated. The respondents have not satisfied me that the grant was of

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melvaram only or that any ryot other than the Inamdars held *kudivaram* rights in the village at the time of the grant but apart from that I am of opinion that the balance of probabilities is in favour of the grant being one of waste land (melvaram and *kudivaram*) or of a village of waste and cultivated lands to ryots who already held *kudivaram* of all the cultivated lands. I accordingly find the 1st and 2nd issues in the affirmative taken alternatively, that is to say, that the original grant included the *kudivaram* of the village and if it did not, then the grantees must be held to have enjoyed the *kudivaram* rights in all the cultivated lands in the village at the time of the original grant. Which of these alternatives is correct is impossible to say owing to the fact that no record remains of the original grant. The former appears more probable but that one or the other must be decided in the affirmative I regard as to be presumed. That the contrary should be presumed the respondents in my opinion have not made out and if the burden of proving the negative of both issues lie on them, I hold that they have failed to discharge it. As regards the 3rd issue, this is a last resort for appellant in case both issues 1 and 2 are decided against him. He would then shelter himself behind the exception to S. 8 of the Estates Land Act and plead that he has acquired the *kudivaram* of the suit lands in addition to the *melvaram* and subsequently to the grant of the *melvaram* in the inams. It is for him, of course, to prove that he has the benefit of the exception. Exhibits D, E and H are surrender deeds by which the Agraharamdars gave half their lands to the Zemindar to extinguish the inam payment on their holdings. It has been held that surrender or abandonment must be regarded as acquisition for the purposes of this exception to S. 8 of the Act, (*Ponnusamy Pallayachi* v. *Karuppudayan* [1]) but in *Venkata Sastrulu* v. *Sitaramudu* [2] following the view of Sadasiva Iyer, J. in *Suryanarayana* v. *Potanna*[3] the opposite view was held. The plaintiff relies on abandonment and surrender of the *kudivaram* right to the inamdars and not on acquisition for valuable consideration. That the tenants in these lands abandoned their occupancy rights if they even had any is made out from the following documents :—

In respect of suit 504, the lands of which were surrendered to the plaintiff by the Inamdars in Exhibit E, we have a lease Exhibit

1. (1914) 26 M. L. J. 285. 2. (1914) 26 M. L. J. 585.
3. (1913) 26 M. L. J. 99.

Sri Raja Varadaraja Appa Rao Garu v. Katnani Kuruvana.

C for *fasli* 1313 to the defendant in suit 504 followed by Exhibit D for *faslis* 1314 –18 which contains a condition that the tenant should quit at the end of the term. In respect of suits 505—8. Exhibits D and H being the surrender deeds we have. (1) Exhibit G for *fasli* 1313 to defendants in 505, 507, 508 suits followed by Exhibits F4, F1, F2, F3 to defendants in 505, 506, 507, 508 with notice to quit at the end of the term *fasli* 1314—1318. The kists were increased heavily. In the face of these conditions to quit and increase of kists it is not likely that any *kudivaram* claim on the part of the tenants could be held then to exist. How and when the *kudivaram* was acquired; there is no direct proof but throughout there is nothing to show that *kudivaram* was held in recent years by others than the Inamdars. Following the latest ruling in *Venkata Sastrulu* v. *Sitaramudu* [1] I find the 3rd issue in the affirmative, namely that subsequently to the original grant, the grantees did acquire, kudivaram rights (if they did not already possess them) subsequently to the grant. In the result, I find all three issues alternatively in the affirmative on presumptions drawn from the balance of evidence establishing inferences in favour of the appellant there being no direct proof; but, if as I think they must, the respondents should prove the negative of issues 1 and 2, then I unhesitatingly find that they have failed so to do.

[These appeals against orders came on for final hearing after the return of the findings of the Lower Court upon the issues referred by this Court for trial.]

L. A. Govindaraghava Iyer and *P. Nagabhushanam* for Appellant.

V. Ramadoss for Respondents.

The Court delivered the following

Judgment:—We have heard the learned Vakil who appeared for the respondents fully and we do not think that the findings of the learned District Judge are open to question before us. We accept those findings. The result of that will be that the plaintiff will have a decree for ejectment and also for occupation rent at the rate of Rs. 40 per acre per year from *fasli* 1319 till the date of the delivery of possession. The appellant will have his costs throughout.

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1. (1914) 26 M. L. J. 585.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH].

Present:—Sir John Wallis, Chief Justice, Mr. Justice Abdur Rahim and Mr. Justice Seshagiri Aiyar.

The Secretary of State for India in Council ... *Appellant* (1st Defendant)*

v.

Illikkal Assan, (died), and others. ... *Respondents. (Plaintiff, Defendants 2 to 4 and L. Rs. of Plaintiff.)*

The Secretary of State for India v. Illikkal Assan.

Madras Land Encroachment Act (III) of 1905; Ss. 5, 6, 7, and 14—Notice under S. 7, if gives rise to a cause of action—Specific Relief Act S. 42. Suit for declaration—Limitation.

A notice under S. 7 of the Madras Land Encroachment Act calling on the person in occupation to show cause why he should not be proceeded against under S. 5 or S. 6 of the Act, does not give rise to a cause of action.

Narayana Pillai v. Secretary of State 1 approved.

Where matters proceed further and penal assessment is levied, a suit brought for declaration of title to the disputed land is governed by the six month's limitation prescribed by S. 14 commencing from the date of the levy of the penal assessment.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Palghat in Appeal Suit No. 347 of 1913, preferred against the decree of the Court of the District Munsif of Parapanangadi in Original Suit No. 650 of 1911.

C. Madhavan Nair for the Government Pleader for the Appellant.

S. Ranganadha Aiyar for *A V. K. Krishna Menon*, Vakil for Respondents 2 and 3.

C. V. Anantakrishna Aiyar, Vakil for Respondents 5 to 10.

The Court (Spencer and Seshagiri Aiyar, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH†:—

The question that arises for our decision is whether the period of limitation for a suit brought by a person who seeks a declaration of his title as against the Government on account of a notice issued by Government under Madras Act III of 1905 is six months as provided by S. 14 of that Act, or some longer period as provided for suits brought under S. 42 of the Specific Relief Act.

* S. A. No. 242 of 1914. 18th October, 1915.

1. (1915) 28 M. L. J. 162.

† 17th August 1915.

The Secretary of State for India v. Illikkal Assan.

In the plaint it is stated that the Collector of Malabar sent a notice to the plaintiff in September 1910 stating that a certain piece of land belonged to Government and offering the plaintiff a puttah for a portion and requiring him to give up the rest at once. In answer to that notice, it is stated that the Collector was required on 21st December 1910, by a registered notice, to release the claim set up by Government and to refund the penalty levied under the Act. It is quite clear that the plaintiff's suit is barred, so far as the recovery of the sum collected by Government is concerned, and both the Lower Courts have held the suit to be barred in this respect. Now, the cause of action is stated in the plaint to have arisen on the 21st December 1910 when a demand was sent to the Collector of Malabar and he did not comply with that demand. But the respondents' vakil concedes that, so far as a cloud was thrown upon his title by the action of Government, the cause of action must date from the notice sent by the Government in September, 1910.

It was held in *Narayana Pillai* v. *Secretary of State* [1] that there were only two causes of action by which a party might be aggrieved and have a right of suit under S. 14 of this Act, and that they were (1) the levy of penalty and to (2) eviction or forfeiture; and the learned Judges who decided that case observed that a person could not be regarded as 'aggrieved' by a mere preliminary notice given by Government before exercising their powers under the Act. But in *Bhaskaradu* v. *Subbarayudu* [2] another Bench decided that a mere notice or denial of the plaintiff's title to property, if taken under the provisions of the Act, would give the plaintiff a cause of action upon which he must sue within six months from the date of the act alleged. The learned Judges observed that, if the plaintiff did not feel himself aggrieved by the notice, he must wait until some further action was taken by Government, but if he alleged it to be a proceeding under the Act he was bound to sue within six months.

We find it difficult to reconcile these two decisions of different benches of this Court. The later decision does not seem to have taken account of the words in S. 14 "such persons, for any such cause of action unless such suit shall be instituted within six months." "Such cause of action" appears to refer to the proceedings mentioned in the first part of the section, by which

1. (1912) 23 M. L. J. 162. 2. (1913) 26 M. L. J. 60.

The Secretary of State for India *v.* Illikkal Assan.

persons may "deem themselves to be aggrieved;" but the explanation shows that a person can be 'aggrieved' within the meaning of this section only by the levy of penalty or by eviction, and this was pointed out in *Narayana Pillai* v. *Secretary of State for India.*[1] No doubt, the service of a notice is a preliminary act before evicting the occupant of the land. (See Ss. 6, 2 and 7 of the Act). But if a person possesses a substantive right to establish his title to property as against any other person who denies his title, such substantive right will not be taken away by an Act of the Legislature without an express declaration to that effect. But as the decision in *Bhaskaradu* v. *Subbarayudu*[2] is against the view we are inclined to take, we refer to a Full Bench the question:—

"Whether a suit for a declaration of the title to a land in dispute, if brought in consequence of a notice given under Act III of 1905 to vacate the land, is governed by the six months' limitation provided in S. 14 of the Act."

The other point argued on behalf of Government is that the suit is barred by limitation under Act XXVIII of 1860. But on this point we consider that the Lower Courts were right in deciding that there was no bar, as there is no material for deciding that the plaintiff had notice of decision of the Survey Officer in 1903 and was concluded by it.

Government Pleader for the Appellant.

S. Ranganadha Aiyar for *A. V. K. Krishna Menon*, vakil for Respondents 2 and 3.

C. V. Anantha Krishna Aiyar vakil for Respondents 5 to 10 and the 4th respondent not appearing in person or by pleader.

The Court expressed the following

Opinion:—We think that a notice under S. 7 calling on the person in occupation to show cause why he should not be proceeded against under S. 5 or S. 6 of the Act, does not give rise to a cause of action. This was pointed out in *Narayana Pillai* v. *Secretary of State*[1] and if the learned Judges who decided *Bhaskaradu* v. *Subbarayudu*,[2] were of a different opinion we are with respect unable to agree with them. Further whether the present suit be regarded as based on the notice under S. 7, or on the levy of penal assessment in June 1910, more than six months before the date of suit, it is in either view barred under S. 14 because it was not instituted within six months from the time at which the cause of action arose.

1. (1912) 23 M. L. J. 162. 2. (1913) 26 M. L. J. 60.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Thiruvengada Konan ... *Appellant** (*Plaintiff*)

v.

Venkatachala Konan and others ... *Respondents* (*Defendants.*)

Thiruvengada Konan v. Venkatachala Konan.

Ejectment—Landlord and Tenant—Dispossession of tenant after being put into possession—Landlord's suit for physical possession—Not maintainable—Decree for symbolical possession, appropriate relief. C.P. C., O. 21 R. 36.

Where a tenant was dispossessed by a trespasser after he was put into possession.

Held, that the landlord could not during the currency of the lease sue for actual possession but might be given a decree for possession of his reversionary interest in the form indicated by O. 21 R. 36. C. P. C.

Sita Ram v. *Ram Lal* 1 followed.

Second Appeal against the decree of the Court of the Subordinate Judge of Tanjore in A. S. No. 455 of 1913 preferred against the decree of the Court of the District Munsif of Tiruturaipundi in O. S. No. 68 of 1912.

C. V. Anantakrishna Aiyar for Appellant.

T. R. Venkatarama Sastri for Respondents.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments:—*Sadasiva Aiyar, J.*—Mr. Justice Hannay and myself held in *Somiammal* v. *Vellaya Sethurayan* 2 that where a landlord (A) is under an obligation to put his tenant (B) into khas possession of the leased land, he (A) is entitled to succeed in a suit in ejectment brought against a trespasser even if the suit was brought during the term of B's tenancy.

In this case, however, the plaintiff had put his tenant (the 3rd defendant) into possession and hence had discharged his obligation as landlord to let the 3rd defendant into actual possession.

But the plaintiff has a reversion in the plaint lands and he might be said to have been dispossessed of that reversion when the defendants 1 and 2 took possession of the lands not only adversely to the tenant (the 3rd defendant) but claiming adversely to the plaintiff's reversion.

In such a case, *Sita Ram* v. *Ram Lal* 1 decides that the landlord can be put in possession of his reversion by the passing of a decree against the trespassers in the form indicated in S. 264 of the old Civil Procedure Code corresponding to O. 21 R. 36 of the Civil Procedure Code. I do not think it is

* S. A. No. 1.32 of 1914. 22nd November 1915.

1. (1896) I. L. R. 18, A. 440 (F. B.) 2. (1915) 29 M. L. J. 283.

Thiruvengada Konan v. Venkatachala Konan.

Sadasiva Aiyar, J

necessary to adopt the rather too broad a view indicated in certain passages of the Judgment of Sundara Aiyar, J. in the case *Ambalavana Chetty* v. *Singaravelu Udayan* [1], that the landlord even in such a case is entitled to khas possession from the trespassers, (the case *Sita Ram* v. *Ram Lal* [2], is not referred to by Sundara Aiyar, J. in his Judgment). Mr. Venkatarama Sastriar for the contesting respondents (defendants 1 and 2) argues that the landlord is entitled only to a declaratory decree and that a decree granting possession of the reversion in the form indicated in O. 21, R. 36 Civil Procedure Code is nothing more than a decree declaratory of the title of the plaintiff to his reversion, which decree he argues should not be given to him at this stage. I think that though the distinction between a decree declaring the landlord's right to his reversion and a decree giving him *possession of his reversionary right* in the lands might be fine (see *Ghulam Hussain* v. *Muhammad Hussain* [3], where existence of the distinction seems to be ignored) the said distinction is a real one. For, it may be argued that a mere declaratory decree against a trespasser will not prevent the limitation period from running on, whereas, a decree for possession of the reversion, properly executed, will nullify the effect of the adverse possession of that reversionary right by the trespasser during that period (at least which elapsed before the possession of the reversion was so obtained in execution).

I think that on the facts found in this case, the plaintiff's suit should not have been dismissed wholly; though he sued for khas possession which he was not entitled to get during the period of the 3rd defendant's lease.

Relying on *Bissesuri Dabee* v. *Baroda Kanta Roy Choudry* [4] and *Sita Ram* v. *Ram Lal* [1] I would give a decree declaring the plaintiff's title to the lands against the defendants 1 and 2 and giving him what is called "formal" possession of the land by the proclamation of his reversionary right, (namely the right to obtain khas-possession of the lands at the end of the term and to be obtaining rents from the 3rd defendant during the term of the lease). The claim for mesne profits will be disallowed.

The parties will bear their respective costs throughout.

Napier, J.:—I agree.

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1. (1912) M. W. N. 669.
2. (1896) I. L. R. 18 A. 440 (F. B.)
3. (1909) I. L. R. 31 A 271.
4. (1884) I. L. R. 10 C. 1076.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Kottapalli Subbamma and another ... *Appellants* (Defendants 1 and 3)*

v.

Jatavallabhula Subrahmanyam ... *Respondent (Plaintiff.)*

Hindu Law—Widow—Relinquishment by widow—Prior alienees—Not affected by.

Subbamma v. Subrahmanyam.

A Hindu widow cannot relinquish her estate so as to affect prior alienations by her which will be good for her life or until re-marriage.

Second Appeal against the decree of the District Court of Godaveri at Rajahmundry in A. S. No. 138 of 1913, preferred against the decree of the Court of the District Munsif of Rajahmundry in O. S. No. 572 of 1911.

B. Narasimha Rao for the Appellants.

G. Venkataramiah for the Respondents.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments:—*Sadasiva Aiyar, J.*—The defendants 1 and 3 are the appellants. The suit was brought on a mortgage bond executed to the plaintiff by a Hindu widow (the 1st defendant). The bond is dated 15th May 1902. On the 16th February 1913 the 1st defendant executed the surrender deed Ex. I in favour of her husband's reversionary heir (the 3rd defendant). This suit was brought on the 20th September 1911 and it was during the pendency of the suit that this relinquishment deed Ex. I was executed. The suit was posted for trial for the 16th February 1912. Then there were five more adjournments and the 6th adjourned hearing date was 7th February 1913. Then the defendants made a request for another adjournment to 7th March 1913 and between these two dates (7-2-13 and 7-3-13) the surrender deed was executed in favour of the next male reversioner the 3rd defendant by the widow the 1st defendant on the 16th February 1913. In the written statement dated 25th October 1911 however, paragraph 5, there is an allusion to a surrender by the first defendant to the minor 3rd defendant. The surrender mentioned in the written statement must therefore relate to an alleged prior oral surrender. The date of that oral surrender is not mentioned in the written statement which was filed more than a month after the suit was filed. That the surrender whether oral or written was deliberately intended in order to defeat the plaintiff's claim to bring the

* S. A. No. 741 of 1914. 16th November 1915.

Subbamma v. Subrahmanyam.

Sadasiva Aiyar, J.

life interest of the 1st defendant in the property to sale for recovery of the plaintiff's mortgage amount cannot in my opinion be disputed and was seriously disputed by the appellant's learned counsel. The Lower Courts held that the surrender could not defeat the right of the plaintiff to get a mortgage decree for sale of the 1st defendant's life interest as the transfer of that interest by way of security to the plaintiff had taken place in 1902 while the alleged oral surrender was at the end of 1911 and the written surrender deed, Ex. I was in 1913.

Mr. B. Narasimha Rao the learned counsel for the appellants has raised two contentions in the memorandum of second appeal. The first contention is that the mortgage document itself was invalid as it had not been proved that it was attested by two persons who saw the executant execute it. This contention however was not pressed at the arguments before us and there is nothing in it as the writer who is also an attestor (see *Radhakishen* v. *Fateh Ali Ram* [1] as to the treating the writer as an attestor for the purpose of S. 59 of the Transfer of Property Act) and another attestor have proved the actual execution of Ex. A.

The remaining contention might be stated in the words of the 6th to 9th grounds of the appeal memo. as follows :—

"6. The Lower Courts were wrong in holding that the plaintiff could have a decree against the life estate of the 1st defendant notwithstanding relinquishment in favour of the next reversioner, the 3rd defendant, which has the effect of extinguishing her estate in the eye of Hindu Law."

"7. The Lower Courts erred in holding that the relinquishment conveyed only the 1st defendant's equity of redemption."

"8. The Lower Courts should have held that relinquishment is equivalent to civil death and that under Hindu Law the next reversioner takes the entire estate unfettered by any invalid alienations made by the widow."

9. "The mortgage having been found to be not binding on the reversioners and the relinquishment having been found to be valid, the Lower Courts have held that the 3rd defendant was entitled to the estate in his own right as if the widow had died and the plaintiff's suit should have been dismissed."

1. (1898) I. L. R. 20 A. 532.

Subbamma *v.* Subrahmanyam.

Sadasiva Aiyar, J.

In *Sreeramulu* v. *Kristamma* [1], a Hindu widow after having sold one of her husband's properties adopted a son. The son sued to recover the property from the possession of the purchaser on contentions very similar to those raised by the 6th to 9th grounds of appeal above set out. Just as Mr. Narasimha Rao contended before us that by the surrender the widow's estate as such ceased to exist and was not available to the plaintiff mortgagee any longer for the purpose of his security, so it was contended in that case that by the adoption the adoptive mother's estate as widow-heir of her husband came to an end and could not be availed of by the prior purchaser from her to advance a claim on his part to remain in possession during the widow's lifetime. Sir Bhasyam Aiyangar J. (at page 148) begins the discussion of the question by stating that the question is really one of 1st impression and presented great difficulty. Then he quotes authorities for showing that a Hindu widow-heir had an absolute right to the fullest benefit in her husband's property for her life and that she has a personal right therein which she can exercise at her will and pleasure, by giving, selling or transferring the estate to another for her own life "or, speaking more accurately, *for the term of widowhood.*" Next, he says that if the alienation was not for any necessary purpose, it will still carve out in favour of the alienee an estate during her widowhood which cannot be defeated by a subsequent adoption. He treats it as clear though he does not say so in so many words that her widowhood does not come to an end by the adoption and that it lasts till her death, unless of course she re-marries and Act. 15 of 1856 applies. At page 155 he says: "A person dealing with a widow reasonably calculates that the alienation will hold good, at any rate, during her lifetime, and except of course in the rare case of a remarriage, this will be ensured by the conclusion herein arrived at even when an adoption takes place subsequent to the alienation." Then the conclusion finally arrived at was that notwithstanding the adoption which put an end to her right as heir to all her husband's property, that is, though the adopted son inherited the adoptive father's property so as to put an end to the widow's right as heir, the property he has inherited could not include the rights already alienated by the widow, the effect of the alienation lasting during her lifetime. Mr. Justice Davies

1. (1902) I. L. R. 26 M. 143.

Subbamma v. Subrahmanyam.

Sadasiva Aiyar, J.

fully concurred in that view. In the case *Singaram Chettiar* v. *Kalyanasundaram Pillai* [1]. Wallis, C. J. and Hannay, J. made the following observations. "In this state of things the defendants contended that the effect of the proceedings in the suit above mentioned was to vest the equity of redemption of the mortgaged property in the mortgagee, at any rate for the lifetime of the widows or the survivor of them. This contention is raised in paragraph 6 of the written statement and is covered by the issues but is not dealt with by the Subordinate Judge, whether from oversight or because it was not strongly pressed before him. But it appears to afford a conclusive answer to the present suit as it seems clear that a widow cannot relinquish her widow's estate to the reversioner affecting the validity of the alienations made by her before such relinquishment which though not binding on the reversioner were binding on her for life. And the result is that during the lifetime of the surviving widow, the equity of redemption remains vested in the defendants as the assignees of the mortgagee and that the present suit is premature."

Mr. B. Narasimha Rao contended that these observations were *obiter dicta* and that even if they were not they were made without the learned Judges having had the benefit of a discussion of that question by the learned vakils who argued that case. I cannot treat the observations as *obiter* as the decision in that case which dismissed the plaintiff's suit and reversed the Lower Appellate Court's decree was fully rested on those observations. Again, I cannot hold on the strength of the reports of the arguments in an unauthorised report *Singaram Chettiar* v. *Kalyanasundaram Pillai* [2], that Messrs. Rangachariar and Muthia Mudaliar who appeared for the appellants in that did not argue the question. Mr. Narasimha Rao then relied upon the case in *Ramakrishna* v. *Tripurabai* [3], in which Chandavarkar, J. criticises Sir Bashyam Iyengar's Judgment in *Sriramulu* v. *Kristamma* [4], and dissents therefrom. That learned Judge preferred to follow the decisions of his own High Court, the decision in *Lakshmanan Bhau Khopkar* v. *Radha Bai Govinda Rau and Bahiru* [5], and *Moro Narayanan Joshi* v. *Balaji Raghunath* [6] both on the ground of *stare decisis* and also as being the sound Hindu Law. On the ground of *stare decisis* I would

1. (1914) M. W. N. 735.
2. (1914) 26 I. C. 1.
3. (1908) I. L. R. 33 B. 88.
4. (1902) I. L. R. 26 M. 143.
5. (1887) I. L. R. 11 B. 609.
6. (1894) I. L. R. 19 B. 809.

Subbamma v. Subrahmanyam.

Sadasiva Aiyar, J.

similarly prefer to follow the opinion of the four learned Judges of this Court in preference to the current of Bombay decisions and as regards the Hindu Law also, I would hold that a widow has got the power to alienate her estate so as to enure during her lifetime notwithstanding any event which may happen after the alienation see *segu Chidambarama* v. *Sareddi Hussainammah* 1.

As I ventured to state in a recent Full Bench case the true and more ancient Hindu Law is in my opinion being gradually restored in many respects by the decisions of the Privy Council. We have seen that the rule of survivorship introduced by modern medieval Hindu Law and the rule of the sons having a legal right to question the debts and alienations of their father have been altered in favour of alienees and creditors for value by the decisions of the Privy Council. The artificial medieval doctrine of a widow having no full power of alienation and the consequent doctrine superimposed by the Bengal lawyers on this doctrine namely, the doctrine of acceleration of the reversion through a surrender by the widow of her rights as her husband's heir (the second doctrine having been adopted for South India also by the Madras High Court) cannot, in my opinion, be pushed to the extent to which Mr. Narasimha Rao wishes that they should be extended, namely so as to defeat the claims of alienees for value who as Sir Bashyam Aiyengar said in *Sreeramulu* v. *Kristamma* 2 were entitled to be protected in their reasonable expectation that they obtain a transfer valid for the widow's life except in the rare case of re-marriage. Mr. Narasimha Rao argued that as re-marriage puts an end to her estate so as to effect even her prior alienees, a surrender should also have the same affect. But re-marriage puts an end to her widowhood while surrender or adoption does not put an end to her widowhood. (I wish to state however that I reserve my opinion even on the question whether her re-marriage though it puts an end to her widowhood will affect the right of the alienee to enjoy the alienated interest during her lifetime though S. 2 of Act 15 of 1856, literally construed is in support of (Sir Bashiyam Aiyangar's opinion). If the survivorship doctrine and if the son's right by birth doctrine are made powerless against the equities and rights of attaching creditors and alienees for value, I do not see any reason why the surrender doctrine (which is not

1. 29 M. L. J. 546 (1915) M. W. N. 577. 2. (1902) I. L. R. 26 M. 148.

less artificial than the above two should be made to affect alienees for value.

Subbamma v. Subrahmanyam.

Sadasiva Aiyar, J.

Mr. Narasimha Rao conceded that a widow who makes a surrender to the reversioner can stipulate for a right to be maintained out of the husband's property during her lifetime and this shows that she does not become civilly dead by the surrender nor does she cease to retain the status of widowhood.

In the result I would dismiss the second appeal with costs.

Napier, J.

Napier, J.:—I agree. The theory that change of status of an assignor or a surrender by such assignor can invalidate legal rights obtained by an assignee is in my opinion so contrary to equity and good conscience that it should not be accepted by courts of this country whatever the ancient Hindu Law on the subject was. The proposition entails a defeasance of an assignee's title by a collusive alienation made with intent to benefit third parties by subsequent assignment (Vide *Challasubbiah Sastri* v. *Palury Pattabhiramayya* [1],) and by a collusive acceleration made with intent to defraud such assignee. It operates not only against the property which she has inherited but also against property purchased out of savings and added to the inheritance, but subsequently alienated. It affects persons not governed by the personal law of Hindus and might injure minor assignees or alternatively their guardians who acted in perfect good faith. There is no reason or principle why alienations for life already made should not enure, and the rest of the estate merge into the reversion and I decline to accept any contention of the reversioner's right beyond this. This appeal will be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Kt., Chief Justice and Mr. Justice Seshagiri Aiyar.

Adusumilli Krishnayya and another.	*Appellants* * (*1st and 2nd Defendants*)
v.	
Adusumilli Lakshmipathi and others.	*Respondents* (*Plaintiffs No. 1, 2, 4 and 5 and Defendants Nos. 3, 4 and 6.*

Krishnayya v. Lakshmipathy.

Hindu Law—Adoption—Widow—Consent of Sapindas—Of next in succession, essential—Exceptions stated—Authority to adopt—Lapse of time—Bar to the exercise of.

* A. No. 94, 95, 180, 217 and 218 of 1912. 27th October 1915.

1. (1908) I. L. R. 31 M. 446.

Krishnayya v. Lakshmipathy.

Though no general rule can be laid down applicable to all cases, ordinarily the only persons with whose consent the widow can make an adoption are those next in the line of succession who are, in the eye of the law, her natural protectors and advisers and an adoption made with the consent of only one of the six nearest reversioners without consulting the rest was held invalid though the assent of all the more remote reversioners also had been procured.

The widow has no right on merely *a priori* reasoning because the nearest reversioners are on inimical terms with her, to conclude that consultation with them would be of no use

Where there are only one or two near sapindas who from improper motives withhold their consent it may be open to the widow to apply to the more remote sapindas.

Quaere, whether mere lapse of time may not be a bar to the exercise of an authority to adopt given by the sapindas.

Courts will be justified in scanning with care an adoption which purports to be based on an authority given many years before the event.

Venkata Krishnamma v. *Annapurnamma* [1] dissented from.

Suryanarayana v. *Venkataramana* [2] approved. *Mami* v *Subbarayar* [3] referred to.

Appeals against the preliminary and final decrees of the Court of the Temporary Subordinate Judge of Kistna at Masulipatam in O. S. No. 40 of 1908.

T. Rangachariar (with *V. Rama Doss*) for Appellants.

S. Srinivasa Aiyangar (with *V. Ramesam*) for Respondents.

The Court delivered the following

Seshagiri Aiyar, J.

Judgments:—*Seshagiri Aiyar, J.*—The plaintiffs sue as reversioners of one Narasamma to recover possession of the plaint properties. The last male owner was Venkatasubbiah, a boy of 14 years. He was murdered in 1888. Two brothers of the 2nd and 4th plaintiffs were suspected of this murder. They were convicted by the Sessions Court; but acquitted in appeal. On Venkatasubbiah's death, his mother Narasamma inherited the properties. She died in 1908.

The 1st defendant is the adopted son of Narasamma. Although the *factum* of adoption was denied in the Court of First Instance, the finding of the Subordinate Judge that the adoption did in fact take place has not been questioned in appeal. The 2nd defendant is an alienee from the adopted son. She is the daughter of the 3rd defendant and grand daughter of Narasamma. The case for the defendants is that the adoption of the 1st defendant by Narasamma is valid.

There are questions both of fact and of law to be considered in deciding whether the adoption was validly made. It is clear that Narasamma made strenuous efforts to obtain the permission

1. (1899) I. L. R. 23 M. 486. 2. (1903) I. L. R. 26 M. 681.
3. (1911) I. L. R. 36 M. 145.

Krishnayya v. Lakshmipathy.

Seshagiri Aiyar, J.

of her Sapindas to adopt a son. She took the advice of Mr. Pundarikakshadu, a leading Vakil of Masulipatam. As a result of his advice she obtained Ex. I giving her authority to adopt a boy, from 14 persons who were her sapindas. At this time, there were six persons who were entitled to succeed to the property of her son, in case she did not make an adoption. Of the six only one signed Ex. I. The other signatories to Ex. I, though gnatis, were not the next reversioners. The geneological tree printed in the Judgment shows that counting from the common ancestor Seshadri, almost all of them were heads of the various branches into which Seshadri's descendants had ramified. The main question which was argued related to the sufficiency of the consent obtained under Ex. I. Mr. Rangachariar contended that all the nearest reversioners were asked to give their consent, but that they refused to accede to the request from improper motives.

We are not satisfied on the evidence that this is made out. It has to be remembered that when Mr. Pundarikakshadu's advice was sought, there were observations in *Venkata Krishnamma* v. *Annapurnamma* [1] to the effect that in seeking the consent of the gnatis nearness of relationship need not be considered. The advice which the vakil gave was apparently with reference to this dictum. Moreover there is evidence that 5 out of the 6 nearest reversioners were not on friendly terms with the widow. Two of them were brothers of the men who were suspected of the murder of Venkatasubbiah. The third was one of the persons suspected. The 4th and the 5th were close friends of the other three. Their attitude was one of hostility to the widow. Under those circumstances, it is unlikely that they would have been asked to give their consent with reference to the state of law then regarded as correct. The fact that a meeting was thought of shows that what Narasamma and her advisers had in view was a general family council without reference to nearness of relationship. The evidence adduced shows that the defendants wanted to strengthen their position with reference to the observations of Benson and Bashiyam Aiyangar, JJ. in *Subramanyam* v. *Venkamma* [2].

Reliance was placed on the deposition of plaintiff's witness No. 29, the daughter of Narasamma and the 3rd defendant in this

1. (1899) I. L. R. 23 M. 486. 2. (1903) I. L. R. 26 M. 627.

Krishnayya v. Lakshmipathy.

Seshagiri Aiyar, J.

case. Before the adoption, there was an arrangement between Narasamma on the one hand, and the 1st defendant and his natural father on the other, by which a good portion of the deceased's property was left at the absolute disposal of Narasamma (See Ex. II). Two weeks after this arrangement, the 1st defendant and Narasamma made a gift of most of the properties obtained under Ex. II to the 2nd defendant (Ex. III). This 2nd defendant is the daughter of the 3rd defendant. Under these circumstances, it is extraordinary that this lady should have been examined as a witness on the side of the plaintiffs. Notwithstanding the condemnation by the Judicial Committee of the practice of calling the opponent as one's own witness, the parties and pleaders in the Mofussal courts do not seem to realise the seriousness of the step they are taking. Naturally, advantage was taken by defendants Nos. 1 and 2 of the presence of the 3rd defendant in the witness box to elicit statements to the effect that plaintiffs Nos. 1 to 4 were consulted prior to the execution of Ex. I. Having regard to her evident bias in the case, much importance cannot be attached to her evidence. We have to see whether there is other independent and reliable evidence to support her testimony. D. W. 4 is altogether unreliable. He has filed his schedule in insolvency. It is this witness who is said to have brought plaintiffs Nos. 1 to 4 to the meeting. His story is on the face of it improbable. The Subordinate Judge does not believe him and we see no reason to differ from him. Defence witness No, 1 is the writer of Ex. I. He was Narasamma's clerk and is now under the defendants. We do not differ from the Lower Court in its estimate of this man's credibility. These are the principal witnesses on whom reliance is placed. Defence witnesses Nos. 5 to 11 also speak to the meeting and the consultation. As against this evidence, we have the evidence of P. W. 8, P. W. I and P. W. 21. We concur with the Subordinate Judge in holding that the defendants have not proved either that plaintiffs 1 to 4 were present at the meeting of the gnatis or that they were consulted regarding the adoption.

Mr. Rangachariar argued that even on this finding the adoption is valid. The learned Vakil's contention is that the Hindu Law does not require that the immediate reversioners should be consulted. All that need be shown, according to him, is that the majority of the gnatis had assented to the adoption. Before dealing with the case law on the point, it should be mentioned

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that the foundation for the theory of the assent of the sapindas is a verse in Yagnavalkya's Smrithi which says :—

रक्षेत् कन्यां पिता विन्नां पतिः पुत्रास्तु वार्धके ।
अभावे ज्ञातयस्तेषां न स्वातन्त्र्यं क्वचित्स्त्रियाः ॥

"Let a female be taken care of by her father while a maiden, by her husband when married, and by her sons in old age. If none of these exists let other gnatis take care of her. A woman is never fit for independence." The idea underlying this passage is that a woman should have the advice and assistance of men in her conduct of temporal affairs and should not act of her own accord. The learned Vakil laid much stress upon the religious significance of an adoption. It is true that the motives which ought to guide the widow in making an adoption should be to minister to the spiritual wants of her deceased husband. It does not follow from this that the assent of the sapindas should be regarded as a religious act. Yagnavalkya's text implies that it is protection in temporal affairs that is contemplated. Consequently, it is not right to argue that the guardianship of the widow who has no son should vest in the entire body of gnatis. The natural interpretation of the text is that she is dependent on the advice of those nearest to her husband. This is apparent by the interpretation which the Viramitrodya places on it :—

मृतेतु तस्मिन् यत्पारतन्त्र्यं तदनुमतिरेवापेक्षिता ।
एवं सति दृष्टार्थता भवते प्रतिषेधस्य ।

"But when the husband is dead, the assent of those only is necessary, *on whom she is dependent.* In this view, the object of the prohibition becomes reasonable." The word "only" would be meaningless, if the consent of the entire body of gnatis is contemplated.

As regards decided cases *Collector of Madura* v. *Mootoo Ramalinga Sethupathy* [1], was most relied upon by the appellant. Their Lordships of the Judicial Committee no doubt say that as women are presumed to be incapable of acting themselves, the authority of the kindred is necessary. At the same time, they say that the consent of the mother-in-law and of a Samanodaka was enough. (This view proceeds on the theory that the assent of the immediate guardian of the adopter would make up for the incapacity.) This coincides with the view enunciated

[1] (1868) 12 M. I. A. 442.

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by the author of Viramitrodya. In *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo* [1], the Judicial Committee differed from the *dictum* of Holloway, J., that the assent of a remote sapinda will validate the adoption and point out that in an undivided family, the consent must be sought from the members of the family alone. This again shows that the text of Yagnavalkya should be understood as limiting the expression 'gnatis' to those who are in the line of heirs to the last owner. It is in *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi* [2] that the expression 'by what may be called a family Council' is first introduced. In that judgment all the sapindas had given their consent. But it was contended that the widow in obtaining the consent did not act on spiritual considerations. In negativing this plea, the Judicial Committee say that the consideration which should guide both the widow and the sapindas 'is the expediency of substituting an heir by adoption to the deceased husband.' The expression 'family council' was not intended to suggest that all the available sapindas should be asked to sit in conclave and decide the question. In *Parasara Bhattar* v. *Rangaraja Bhattar* [3], Sir Charles Turner and Innes, reviewed all the previous authorities on the question of the sapindas' consent. The learned Judges say: 'without the express or implied authority of the husband such a second adoption could be made only under the sanction of the *nearest sapindas*'. This is a clear pronouncement on the nature of the sapinda sanction. *Venkatakrishnamma* v. *Annapurnamma* [4] contains certain observations on which the appellant naturally relies. On the facts found that case presents no difficulty. Three out of the four nearest sapindas gave their consent to the adoption. The fourth man who held out contested the adoption on the ground that his refusal rendered the adoption invalid. The learned Judges overruled this plea. They held that the assent of the majority of the nearest sapindas was sufficient.

Subramania Aiyar, J. further went on to say "It should at the same time, be borne in mind that a mere numerical majority, whether in favour of or against an adoption, will not by itself determine the question. Adoption being a proper act it will be presumed that when the majority give their assent such assent was given on *bona fide* ground. If, however, it be shown that

1. (1876) I. L. R. 1 M. 69.
2. (1876) I. L. R. 1 M. 174.
3. (1880) I. L. R. 2 M. 202.
4. (1899) I. L. R. 23 M. 486.

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the majority give or withhold their assent from improper considerations, such assent or dissent will be of no avail to the party relying on it.) If the above view is correct it would further follow that any distinction, based upon the degree of relationship, as the whole assent is or is not essential becomes immaterial." We are unable to see how the conclusion in the last sentence follows from the proposition stated in the preceding sentence. In an earlier passage, the learned Judge, stated "Now, even in the case of an undivided family, when a widow of a member thereof makes an adoption without the authority of her husband or the assent of her father-in-law, it cannot be taken to be the settled law that the assent of all the then surviving members of the co-parcenary is absolutely necessary." ("If the consent of all co-parceners in a joint family is not necessary, *a fortiori* the consent of all sapindas in divided branches is unnecessary.") We do not think that the learned Judge intended to lay down that the consent must be sought from Sapindas of every grade in divided families. Benson and Bashiyam Aiyangar, JJ. in *Subramanyam* v. *Venkamma* [1] lay down the law in explicit terms after a careful examination of all the previous authorities. The learned Judges say " The expression 'family council' in the above extract is no doubt rather too general and comprehensive. It is not probable that it was intended to include the whole circle of Sapindas and Samanodakas or to imply that they should assemble. The presumptive reversionary heir or heirs are the nearest of kin to the deceased husband and as such the natural advisers of the widow; and if his or their assent be obtained and the same be given *bona fide* and not from any corrupt motive, that would be sufficient authority on which she could act, and it would not be necessary that she should seek the assent of remoter reversionary heirs." We entirely agree with this statement of the law. This decision was affirmed by the Judicial Committee in *Venkamma* v. *Subramaniyam*.[2], and it is clear that their Lordships proceeded on the same lines as did the Judges of this Court. The observation of the learned Judges who made the remand order in *Suryanarayana* v. *Venkataramana* [3], that there is no authority for the position that the assent must be that of the nearest Sapindas is not correct as *Parasara Bhattar* v. *Ranga Bhattar* [4], does lay down

1. (1903) I. L. R. 26 M. 627.
2. (1907) I. L. R. 30 M. 50.
3. (1903) I. L. R. 26 M. 681.
4. (1880) I. L. R. 2 M. 202.

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that proposition. The actual decision on the return of the finding was based on other grounds. In *Veera Basavaraju* v. *Balsurya Prasada Rao* [1], the nearest reversioner was not consulted. The sentence "she made no such *bona fide* effort to take the opinion of the Sapindas or a majority of them as the law requires," does not mean that the (consent of the) majority of all remote reversioners should be obtained. These are all the authorities on the subject. We are of opinion that as the assent is regarded as a substitute for the authority of the husband and as the Hindu Law enjoins that *such an assent* should be obtained from those who would be the natural advisers and protectors of the widow, *prima facie*, it should be sought from those who are next in the line of succession. There is no direct authority which holds that where there are near Sapindas, the adoption is invalid, if the remoter ones are not consulted. It would introduce an inconvenient and unworkable principle, if it were held that in a large family the assent of the majority of persons who are capable of giving their consent should be obtained. Mr. Rangachariar felt the difficulty and suggested that the assent of all persons observing 10 days' pollution would be enough. This suggestion is opposed to *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* [2] where a Somanodaka is mentioned as being competent to give consent. No general principle applicable to all cases can be laid down. Where the nearest Sapindas are a sufficiently large number as in this case, it is unreasonable to contend that they should be ignored, and that the widow is entitled to apply to persons more remote. Where there are only one or two near Sapindas who from improper motives withhold their consent, it may be open to the widow to apply to more remote Sapindas. We are clearly of opinion that it was the duty of Narasamma to have applied to the plaintiffs in this case for their consent and as we have found that that has not been done we hold that the adoption is invalid. We cannot accede to the contention that as the plaintiffs would surely have refused to give their consent as they were inimical to her, that Narasammah was justified in not consulting them. As was pointed out in *Subramanyam* v. *Venkamma* [3] and *Venkammma* v. *Subramanyam* [4], it was her duty to have asked their permission. She has no right to conclude on *a priori* reasoning that the consultation would prove futile.

1. (1914) M. W. N. 502.
2. (1868) 12 M. I. A. 397, 442.
3. (1903) I. L. R. 26 M. 627.
4. (1907) I. L. R. 30 M. 50.

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Another contention against the validity of the adoption was raised by Mr. S. Srinivasa Aiyangar. The consent under Ex. I was obtained in 1901. The actual adoption was in 1908. The learned Vakil for the respondent argued that the authority had spent itself out by such a long delay.

There is no doubt that at the time of the adoption some of the signatories to Ex. I were dead. It was said that 4 out of the 14 had died. In *Mami* v. *Subbarayar* [1] it was held that lapse of time was a bar to acting on the authority (See also *Veera Basavaraju* v. *Balasurya Prasada Rao* [2] and *Nagarampalli Kamesam* v. *Nagarampalli Butchamma* [3]. It is not necessary for us in this case to decide whether the authority loses force by the mere lapse of time. Courts will be justified in scanning with care an adoption which purports to be based on an authority given many years before the event. In the result we agree with the Subordinate Judge in holding that the 1st defendant was not validly adopted and that the alienations made by him and Narasamma are not binding on the plaintiffs. The appeal is dismissed with costs.

The Chief Justice:—I agree.

In Appeal No. 95 of 1912.

We allow the appeal as to items 10, 27 and 28 of Schedule B and item 71, 1-60 acres of item 72 and item 74 of Schedule A. as the evidence on behalf of the 3rd defendant appears to establish her right to these items. The appeal is allowed as to these items and is otherwise dismissed. The appellant will pay proportionate costs of this appeal throughout.

In Appeal No. 180 of 1912.

We agree with the Subordinate Judge as to the items in Schedule B included in this appeal and as regards the 3rd defendant we dismiss the appeal with costs. As regards Schedule C we allow the plaint to be amendedly including a prayer for possession on payment of the necessary court-fees in both Courts. As to this, the appeal is allowed and the decree will be varied by giving a decree to the plaintiffs for joint possession with defendants Nos. 4 and 6, but the appellant must pay the costs of the 4th and 6th defendants here and below. The memorandum of objections is dismissed.

1. (1911) I. L. R., 36 M. 145. 2. (1914) M. W. N 502.
3. (1914) M. W. N. 620.

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In Appeal No. 217 of 1912.

We allow the appeal. There will be no order as to costs.

In Appeal No. 218 of 1912.

The decree is set aside and a fresh final decree will be passed in accordance with our decisions in the other appeals.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice and Mr. Justice Seshagiri Aiyar.

Thiruvambala Desikar Gnana Sambanda Pandarasannadi Avergal and another. — *Appellants* in Appeal No. 22 of 1911 and Petitioner in C. R. P. No. 25 of 1911 (Plaintiff's L. R.).*

v.

Chinna Pandaram *alias* Manikkavasaka Desikar (died) and another. — *Respondents in Appellant No. 22 of 1911 and C. R. P. No. 25 of 1911 (Defendant and his L. R.)*

Thiruvambala Desikar Gnana Sambanda Pandaram v. Chinna Pandaram *alias* Manikkavasaka Desikar.

Religious Endowment—Mutts— Junior Pandarasannadhi—Nature of the office—Removal from office—Grounds for—Notice of charges necessary—Offices at pleasure—Incidents of—Compromise decree recognising plaintiff as holder of a religious office—Validity of—Civil Procedure Code S. 367 (O.C.)—Suit by a legal representative to establish his position as such—What the plaintiff in such a suit is bound to show—Mutts, whether voluntary associations or brotherhoods—Immorality of a Matadhipati or junior—Whether entails forfeiture of the position.

Where the Matadhipati of the Dharmapuram Adhinam having ordained and nominated a junior Pandarasannadhi purported to remove the junior without giving him any notice or opportunity to answer the charges against him,

Held that the dismissal was bad.

The nomination and ordination of a junior Pandarasannadhi is the customary manner of providing for the line of succession in Mutts of the kind; and the Pandarasannadhi (Matadhipati) can dismiss the junior only for good cause and not arbitrarily.

The position of a junior Pandarasannadhi is analogous to that of a co-adjutor, with the right of succession, a right of which he cannot be deprived except for ood cause.

Where an office is held at pleasure, the holder of the office can be removed without any notice In all other cases, there should be notice to the incumbent of the office to answer the charges before dismissing him.

Where a Matadhipati purports to remove a junior and the latter filed a suit questioning the dismissal, a compromise decree in such suit recognising the plaintiff as junior is binding on the parties to the suit and their representatives unless such decree is set aside by a separate suit on proper grounds. Till the decree is set aside, it is binding on the parties just as much as if it had been passed after contest.

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* A. S. Nos. 22 and 36 of 1911 and C. R. P No. 25 of 1911. 20th December 1915.

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Any illegality in the compromise decree in so far as it restrains the Matadhipati from removing the junior in case of any future misconduct of the latter is no ground for setting aside the decree altogether in a suit by the Matadhipati for that purpose.

Per Seshagiri Aiyar, J.—Where a Matadhipati brings a suit for a declaration that the defendant, whom he appointed as a junior and in whose favour he relinquished the Mutt and all the properties, is not the lawful Pandarasannadhi, and dies pending the suit and a person appointed by him as successor before his death applies to continue the suit as legal representative and he (the representative) is directed to bring a separate suit to establish his character as legal representative under S. 367 of the old Code, he should in such subsequent suit show that he has stepped into the shoes of the deceased with all the attributes he claimed and it is open to the defendant in the later suit to show that the deceased had no rights to transmit.

The junior Pandarasannadhi does not hold his position at the will of the senior.

The position of the junior Pandarasannadhi discussed.

Mutts are not voluntary associations, or brotherhoods; and the heads of the institutions have no plenary powers to dismiss any member including the junior Pandarasannadhi.

The head of a Mutt or a junior does not forfeit his position by misconduct such as leading an immoral life but is liable to be removed for such misconduct. There can be no condonation of such an offence as in the case of breaches of trust.

Where in a suit by the junior Pandarasannadhi against the senior questioning the dismissal of the junior from his position, a compromise is come to the object of, which is to recognise the usage of the institution and to accept the validity of the original appointment and a decree is passed on the compromise, such a decree is not illegal.

The nature and validity of compromise decrees discussed.

Appeal against the decree of the Court of the Subordinate Judge of Mayavaram at Kumbakonum in O. S. Nos. 33 and 53 of 1907 respectively and petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Mayavaram at Kumbakonum in O. S. No. 33 of 1907 dated the 30th September 1910.

S. Srinivasa Aiyangar and *T.V. Gopalaswami Mudaliar* for the Appellant.

R. Sadagopachariar and *T. Narasimha Iyengar* for the Respondent.

The Court delivered the following

The Chief Justice.

Judgments:—*The Chief Justice.*—In Appeal No. 36 of 1911:—This appeal relates to the headship of the wealthy Mutt or Adhinam of Dharmapuram in the Tanjore District the affairs of which are unfortunately the subject of endless litigation before us. Sivagnana who was for many years Pandarasannadhi or head of the Mutt filed O. S. No. 86 of 1906 in the Subordinate Court of Kumbakonum to set aside a deed of relinquishment Ex. S,

executed by him in 1903 in favour of Manikkavasaka, the defendant in this suit, whom he had previously ordained and nominated as junior Pandarasannadhi with the right of succession according to the custom of the institution. Sivagnana died shortly after the institution of the suit and the present plaintiff sought to be brought on the record as his legal representative on the ground that the day before he died, Sivagnana had ordained him and executed a will in his favour. It was held by the Subordinate Court, and by this Court on appeal, that the plaint in O. S. No. 86 of 1906 called in question the right of the defendant to be junior Pandarasannadi as well as his right to enjoyment of the Mutt properties under the deed of relinquishment, and it was accordingly ruled at the instance of the present plaintiff that the suit did not abate on Sivagnana's death, and under S. 367 of the Civil Procedure Code, the Court stayed the suit and left the plaintiff to bring the present suit against Manikkavasaka to establish that he is the legal representative of the deceased Pandarasannadhi and so entitled to continue O. S. No. 86 of 1906.

This suit necessarily involves the question whether the defendant Mannikkavasaka had been lawfully appointed junior Pandarasannadhi, and also the further quest on whether he was lawfully removed during the life time of Sivagnana, as, if not, he and not the plaintiff is the legal representative of the deceased. Accordingly the pleadings and issues in this case cover much the same ground as the principal suit. During the pendency of this suit the defendant Manikkavasaka has also died after nominating and ordaining a successor who has been brought on the record as his legal representative, so that the contest s now between the plaintiff claiming as nominee of Sivagnana and the present respondent claiming as the nominee of Manikkavasaka.

The Subordinate Judge has dismissed the plaintiff's suit on two grounds that Manikkavasaka must be taken to have been validly appointed and not to have been removed and that he was consequently Sivagnana's legal representative, and secondly on the ground that the plaintiff has failed to prove the will and ordination on which he relies to establish his character of legal representative. Either of these findings is sufficient to dispose of the present suit.

As pointed out by the Subordinate Judge in his very careful Judgment, this case is the last stage n a long dispute between the

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defendant and an opposing faction in the Mutt headed by one Somasundara Thambiran, who at one time belonged to the institution and subsequently became the head of the wealthy Tiruppanandal Mutt. These opponents of the defendant endeavoured in the first instance to prevent his nomination as junior Pandarasannadhi and afterwards to get that nomination revoked. In the course of the dispute we find Sivagnana a weak and feeble old man embarrassed by the load of debts accumulated by his management acting under the influence first of one side and then of the other.

We first find him ordaining and nominating the defendant on 22-4-1900 (Ex. XXIII) in spite of the pendency of a suit,—subsequently dismissed—to prevent him from making the appointment, and then on 27-9-1900 giving a power of attorney to the defendant. On 19-6-1901 he cancelled the power by Exhibit MM. which contained injurious charges against the defendant The defendant on 2-7-1901 by Exhibit UUUU surrendered the properties he had taken possession of under the power, and a few days later Sivagnana executed X by which he withdrew the charges against the defendant contained in Exhibit MM. Two months later on 12-9-1901, he purported by Ex. K to remove the defendant from the position of junior Pandarasannadhi on account of malversation and on vague charges of sexual immorality of which no particulars whatever were given. Thus challenged the defendant preferred a criminal complaint against him for defamation, and also filed a Civil Suit O. S. No. 74 of 1901 questioning his alleged dismissal. The next thing was that a compromise was arranged. The defamation case was withdrawn, and the suit was settled by a razinamah Ex. P 2 in which it was recited that the defendant Sivagnana had on further enquiries ascertained that the accusations made against Manikkavasaka were groundless, and that there were no reasons for dismissing him, and by which his right was recognised and it was further agreed that certain properties belonging to the Mutt should be handed over to him. On this a decree Ex. P 1 was passed on 2-1-1902 declaring him to be the junior Pandarasannadhi and the deed of dismissal to be null and void, and restraining Sivagnana from appointing any one else as junior Pandarasannadhi.

Eighteen months later on 7-6-1903 Sivagnana executed a deed of relinquishment Ex. S by which he retired in favour of the

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defendant, and sometime afterwards made his way to Benares. He returned from Benares early in 1906 and went to stay with the defendant's enemy Somasundara at the Tiruppanandal Mutt whence he sent the defendant on 12-5-1906 a notice, Ex. T of his intention to file a suit for declaration that Ex. S was invalid and to recover the Mutt properties. A suit was subsequently filed as O. S. No. 86 of 1906 for that purpose. It has been contended before us that Ex. T amounted to a fresh dismissal of the defendant from the office of junior Pandarasannadhi, but we do not so read it. There is, however, oral evidence that on two occasions after his return Sivagnana purported to dismiss the defendant from this office also. Sivagnana died on the morning of the 1st December 1906, as alleged by the plaintiff, or on the evening of the 30th November as alleged by the defendant. According to the plaintiff's case Sivagnana conferred abishekam upon him on the 30th and also executed a will Ex. W nominating him as his successor, but the finding of the Subordinate Judge is that the alleged abishekam and will have not been proved. This is a brief statement of the facts which are more fully set out in the Judgment of the Subordinate Judge.

The fifth and sixth issues dealt with the validity of the defendant's original appointment, and with the question whether Sivagnana was entitled to dismiss him, referring to the first dismissal under Ex. K.

It appears from a note made by the Subordinate Judge in his record of the evidence that it was arranged, probably at the suggestion of the defendant's pleaders, that evidence on these issues should be reserved until after the disposal of issues 7 to 8 as to the compromise decree in O. S. No. 74 of 1901 which if found in favour of the defendant would make issues 5 and 6 unnecessary.

It will be convenient to consider in the first place whether the compromise decree in O. S. No. 74 of 1901 is valid and binding. As already stated it was entered into after Sivagnana had purported to dismiss the defendant by Ex. K and defendant had replied by filing a complaint for defamation and a suit to declare the alleged dismissal illegal. The Subordinate Judge has found that it was brought about after protracted negotiations and on the independent advice of persons who had the interests of the institution at heart and not by means of any pressure or oppression on the part of the defendant. If Sivagnana was not in

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a position to justify the charges he had made against the defendant, it was eminently proper for him to withdraw them, instead of committing the Mutt to further ruinous litigation. I do not however consider it necessary to pursue the matter further, because in my opinion the consent decree in O. S. No. 74 of 1901 was binding on Sivagnana and is also binding on the present plaintiff who claims through him, and even if there had been any grounds for setting it aside by suit, such a suit became barred during the lifetime of Sivagnana. A consent decree is binding on the parties to the suit until it is set aside just as much as if it had been passed after contest. *Fateh Chand* v. *Narasing Das* [1], citing *In re South American and Mexican Banking Co* [2]. The effect of the consent decree in O. S. No. 74 of 1901 is to establish as against Sivagnana and those who like the present plaintiff claim through him that the defendant had been duly appointed junior Pandarasannadhi and continued to hold that office at the date of the decree. Consequently, unless he was subsequently removed, he was junior Pandarasannadhi at the death of Sivagnana and then became his legal representative and entitled to succeed to his office. As regards the alleged illegality in the compromise decree in so far as it restrains the plaintiff from removing the defendant in case of future misconduct, I do not think that this would be any ground for setting aside the decree altogether in a suit by Sivagnana for that purpose, for it does not affect the consideration obtained by Sivagnana for entering into the compromise. See also *Kearney* v. *Whitehaven Colliery* Co. [3]

It is, however, found by the Subordinate Judge that after his return from Benares in 1903 Sivagnana purported to dismiss the defendant and it is contended that these dismissals were operative. To succeed in this contention it would be necessary for the plaintiff to get over the deed of relinquishment Ex. S executed in 1903 by Sivagnana in favour of the defendant which is attacked among other grounds as having been procured by coercion and undue influence and so liable to be set aside in the present suit. It is however, unnecessary to consider this question because assuming that Sivagnana continued to hold the office of Pandarasannadhi after the execution of Ex. S and that as such he was empowered to dismiss the defendant from the office of junior Pandara-

1. (1912) 22 C. L. J. 383. 2. (1895) 1 Ch. 37.
3. (1893) 1 Q. B. 700.

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sannadhi, it is not shown that the defendant received any notice or was given any opportunity of answering the charges on which Sivagnana purported to dismiss him. It has been contended before us that the defendant only held office at the pleasure of the Pandarasannadhi and that consequently the latter was entitled to dismiss him without giving him any opportunity of being heard. The nomination and ordination of a junior Pandarasannadhi is the customary manner of providing for the line of succession in Mutts of this kind, and it is not shown that the Pandarasannadhi has any power of arbitrary dismissal, while on the other hand, it has been held, in a previous suit relating to the institution that he may dismiss for good cause. In *Vidyapurna Thirthaswami* v. *Vidyanidhi Thirthaswami* 1, where the question was whether a Pandarasannadhi forfeited his position as such by reason of lunacy recourse was had to the analogies of the Canon Law, and applying those analogies to this case, the position of the junior Pandarasannadhi during the lifetime of the elder would appear to be that of a co-adjutor with the right of succession, a right of which he cannot be deprived except for grave cause. When an office is held at pleasure the incumbent may be removed even on charges of misconduct without any opportunity of being heard, because he is removable at pleasure without any misconduct at all, but in all other cases, 'the objection for want of notice" " in the language of an old case " " can never be got over. The laws of God and man both give the party an opportunity to make his defence if he has any." *Rex* v. *Chancellor and Master of the University of Cambridge* 2, and *Cooper* v. *The Wandsworth, Board of Works* 3. In *Willis* v. *Gipps* 4 the principle was applied to the case of a Colonial Judge who held office at the pleasure of the Crown but was also removable under a statute by the Governor and Council of the Colony for neglect of duty or other misbehaviour and it was held by the Judicial Committee that this order of *amotion* was bad because made without notice. It is not suggested in the present case that any notice was given to the defendant by Sivagnana of the charges on which he purported to dismiss him after his return from Benares, and consequently such dismissal is wholly void and inoperative and the defendant, if he had not already succeeded by virtue of Ex. S, remained the junior Pandarasannadhi and on Sivagnana's death was his legal representative

1. (1904) I.L.R. 27 M. 435. 2. (1723) 1 Str. 557=8 Mod. 148.
3. (1863) 14 C.B.N.S. 180. 4. (1846) 5 M.P.C. 379=6 State Trials New Series 311.

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and entitled to succeed him. This is sufficient to dispose of the present case, but as to the other part of the case I may say that after listening to the elaborate arguments which have been addressed to us I am not prepared to differ from the finding of the Subordinate Judge that the Abishekam of the plaintiff and the alleged will of Sivagnana in his favour have not been proved. The appeal is dismissed with costs.

Appeal No. 22 of 1911 and Civil Revision Petition No. 25 of 1911 follow and are dismissed with costs.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.:—In O. S. No. 86 of 1906 Sivagnana Desika Gnana Sambanda sued for a declaration that Manicka Vachaka Desika was not the Pandarasannadhi of the Dharmapuram Mutt and that the compromise entered into in O. S. No. 74 of 1901 is not binding on him. Sivagnana died on the 1st of December 1906, while the original suit was pending. The present plaintiff claimed to have been nominated by Sivagnana as his successor and applied to be brought on the record as his legal representative to continue the suit against the defendant. Manicka Vachaka, the defendant, pleaded that the suit abated with the death of Sivagnana and that plaintiff was not the legal representative of the deceased. On this application to be brought on the record the High Court agreeing with the Court of First Instance directed the plaintiff to establish his claim as the legal representative in a regular suit. The present suit, O. S. No. 53 of 1907 is the outcome of that order.

The plaintiff's case is that Sivagnana appointed him as his successor by a will executed on the 30th of November and that the necessary ceremony of Abishekam was performed on that day. He impeaches the validity of Manicka Vachakar's nomination by the will of Sivagnana on the 22nd of April 1900 on various grounds. He says that the will was brought about in order to avoid a conviction for defamation and that it was cancelled by the later will of the 12th September 1901. He further alleges that Manicka Vachaka was unfit to be a Pandarasannadhi in consequence of immorality and that Sivagnana validly revoked the nomination. As regards the compromise in O.S. No. 74 of 1901 the plea was that it is *ultra vires* in that it restrained Sivagnana from making any further appointment and that it was beyond the power of a Pandarasannadhi to consent to the terms embodied in it. The relinquishment of the 7th

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June 1903 is attacked on the ground of undue influence. The plaintiff prays for a declaration that the defendant was not the lawful Pandarasannadhi of the Dharmapuram Mutt and for the recognition of his right to succeed Sivagnana.

The defendant (who died pending the appeal after nominating his successor who is the present respondent) traversed all the allegations and maintained that his nomination was proper and valid, that the razinamah was binding on Sivagnana and that the relinquishment clothed him with full rights even during the life-time of Sivagnana.

Before discussing the various questions of law which have been very ably argued in the appeal, I shall deal with issues 3 and 3 (a) which relate to the plaintiff's nomination. The Subordinate Judge has dealt with this question at considerable length and although I am not prepared to agree with all the reasons given by him, I agree in the conclusion at which he has arrived.

The will is said to have been made on the afternoon of the 30th November in Tiruppanandal, where Sivagnana had been living since his return from Benares 6 months ago. Sivagnana died on the morning of the 1st of December. The will, Ex. W, was not registered. Evidence has been let in to show that one Muthu Aiyar was asked at about 5 P.M. to go to Thiruvadamarudur (8 miles from the place) to bring the Sub-Registrar. Muthu Aiyar went there only next morning with Exh. SS. The Sub-Registrar learnt at about 7-30 that the testator was dead and therefore did not go to Tiruppanandal. The will was apparently thought of on the 29th according to the plaintiff, and if that is true, it is impossible to believe that the Thambiran of Tiruppanandal Mutt who was helping Sivagnana, who was a gentleman of great influence would not have sent a messenger to Thiruvadamarudur early in the day on the 30th to bring the Sub-Registrar. There is considerable force in the suggestion of Mr. Sadagopachariar that Exh. SS was written to create evidence and not with the intention of procuring the attendance of the Sub-Registrar. Another circumstance is that the will does not refer to Abishekam which according to the evidence preceded its execution. Mr. Sadagopachariar's suggestion that this important matter was left out because there was no Abishekam and that the will when got up did not therefore mention it is entitled to weight.

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A significant fact is that Somasundara Thambiran, the head of the Tiruppanandal Mutt did not attest the will. It was under his protection the testator lived. There can be no doubt that he was the man on whom Sivagnana relied for everything. If it was a genuine will his failure to attest is not easily explainable. It is true that all the attesting witnesses have been examined in the case and support the will. Almost all of them were under the influence of Somasundaram. No doubt at Tiruppanandal it is not easy to get witnesses who would not be beholden to the head of the Mutt in some way or other. At the same time too much stress should not be laid on the number of attestors and their consistency in supporting the will. I do not think that the evidence of D. W. No. 2 is entitled to credit when it is not supported by his certificate Ex. XVII. I see no reason to think that the Sub-Assistant Surgeon was not speaking the truth. Even on that evidence I must say that the signatures in Ex. SS and W do not satisfy me as those of the testator. They are not those of a person who had gone through the fatiguing ceremony of Abishekam an hour earlier and who died the next day. I do not think it fair to compare these signatures with that in Ex. XIII (c); because it is clear to my mind that Sivagnana was feigning illness at that time. The Subordinate Judge is apparently of opinion that the draft will was itself a concoction. Although to my mind the language of the document shows that it was not the production of Mr. Ramasubbier, there are ample grounds for believing that this draft was in existence before the 29th of November. The pencil interlineations by Somasundara show that he wanted the will to contain a clause enabling the plaintiff to prosecute the suit. It was scored out. If it was a concoction after the 1st of December such an interlineation would not have taken place. Nor am I satisfied that pleader Doraisami Pillai was not speaking the truth when he said that he had the will on the evening of the 1st of December. What he says about what he heard before he started for Tiruppanandal must be due to lapse of memory. It is curious that the will should have been handed over in such hot haste to Doraisami Pillai. I, however, see no reason to disbelieve his evidence. The will was apparently brought into existence before Doraisami Pillai arrived and it was thought safer to entrust it to a respectable pleader than to keep it at Tiruppanandal. On the broad

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facts of the case, I am not satisfied that the evidence adduced by the plaintiff is sufficient to establish the genuineness of the will. I agree with the findings of the Lower Court on these two issues. Even if the will be true, if the plaintiff did not go through the ceremony of Abishekam, he has no *locus standi*; for it is by that ritual, the nominee acquires the right to be installed as Pandarasannadhi. There is a considerable body of evidence on this question. To my mind the non-mention of it in Ex. W is fatal to this part of the case. The entry of the expenses in the Mutt account does not carry the matter any further. I attach very little importance to what the Sub-Judge considers to be developments in the story; for after the cross-examination was directed to details, the plaintiff's legal adviser would naturally elicit those details in the examination-in-chief. I agree with the Subordinate Judge that the performance of Abishekam has not been satisfactorily proved.

These findings would ordinarily be enough to dispose of the appeal, but as the right of the defendant has been strenuously attacked on various grounds it is desirable to state our conclusion on the various points in controversy so that there may not be room for future litigation.

Mr. Srinivasa Aiyangar contended that in order to succeed in the suit all that need be shown by the plaintiff is that he acquired all the rights which Sivagnana was capable of conferring on his client, and that the rights of the defendant need not be gone into in this litigation. I do not think that this contention is well founded. The plaintiff as legal representative must show that he has stepped into the shoes of the deceased with all the attributes which he claimed. It is open to the defendant to prove that the deceased had no rights to transmit. The right of representation is claimed with reference to an office, and it is undoubtedly within the competency of the defendant to show that the office was full and that there was no room for a successor. The learned Vakil's contention amounts to saying that the representation need only relate to all that the deceased was possessed of at the date of his death. This may or may not be the correct position to take where the deceased sued in his individual capacity. Probably in such cases, all that the applicant need show is that he is full heir to the party who is dead. But where the suit is brought in a representative capacity, the legal representative must show that the estate devolved on him. The estate in

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this connection is not the estate which the deceased had, but the estate which he represented, that is the estate to which he laid claim. If there was no estate outstanding, there can be no legal representation. I realise that the effect of such a decision is to compel the person seeking to come in as a legal representative to prove the very matters in controversy in the main suit. I do not see much hardship in this. To hold otherwise would be to expose the defendant to attacks from persons who could establish no claim to the trust of which he is in possession. In my opinion, the import of the words in O. XXII, R. 3 (1) "where a sole plaintiff dies and the right to sue survives" shows that the applicant should be in a position to lay claim to the right which was agitated in the suit. Conversely the defendant can show that the person who seeks to continue the litigation had not acquired the right claimed, because that right was vested in himself. I am therefore of opinion that this objection fails.

In dealing with the right of the defendant, the first point on which Mr. Srinivasa Aiyangar laid great emphasis was that the position of a junior Pandarasannadhi is not a free hold office; but that it is a position held during the pleasure or will of the senior Pandarasannadhi, the appointer. I am not inclined to hold that it is a freehold office in the sense in which the Subordinate Judge designates it. But I feel no doubt that the appointee does not hold it at the will or pleasure of the appointer. Under the Hindu Law the property of a hermit or an ascetic is inherited by the preceptor and after him by his disciple: Mitakshara Ch. II, S. 8. See also Yajnavalkya Smrithi, Slokas 187, 188 and 191. In the cases of Mahants or heads of Mutt, the same rule would apply, although the precedence given to the preceptor is open to question. It is now well-established that the rule of succession among the Matadhipatis must be deduced from the usages of the Mutt. See *Greedharee Doss* v. *Nundokissore Doss, Mohunt* [1] and *Ramalingam Pillai* v. *Vythilingam Pillai* [2]. In the first of these two cases, their Lordships of the Judicial Committee inclined to the view that the ordinary mode of succession in Mutts is by appointment of the successor by the predecessor either by will or by word of mouth. That is the practice in all the important Mutts in this Presidency. Now, the question is whether this power of appointment carries with it the absolute power of dis-

1. (1867) 11 M. I. A. 405. 2. (1893) L. R. 20 I. A. 150.

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missal as was strenuously contended for by Mr. Srinivasa Aiyangar, or whether by the appointment, a status is acquired by the appointee which is not lost unless removed for good cause. After listening to the very able argument of the learned Vakil for the appellant, I feel no hesitation in holding that the appointer has not the absolute power to dismiss which is claimed for him. Before dealing with the cases cited, I shall refer to what takes place on the nomination of a successor in this Mutt. Ex. C, the plaint in O. S. No. 21 of 1900 mentions in para. 4, the ceremonies that have to be gone through in selecting a successor and also those which the person selected has to undergo. The most important of these is the Abishekam. The rites to be observed on this occasion are described by the plaintiff as his 33rd witness. This may be taken to represent correctly what happens when a junior Pandarasannadhi is anointed. It is also in evidence that the senior Pandarasannadhi himself offers puja to the junior, because by the Abishekam the junior attains godhead. The Abishekam enables the junior to initiate disciples himself. He performs separate puja to gods Vignesvara and Subramania. He is called the Sadhaka Acharya, or co-adjutor with the senior. These being the attributes with which the junior is invested, I am unable to accede to the suggestion that he acquires no status and his position is dependent on the good will of the senior. To my mind, by these ceremonies the senior is instituting an heir to himself. It may be that the analogy of the adopted son would not apply in all particulars. I am willing to concede that the right of removing the junior for proved misconduct inheres in the senior. Otherwise a person once anointed must be retained even if he has proved himself utterly unfit to hold the religious office. But the grounds of removal must be such as would disentitle the senior himself to continue in office. Subject to this reservation I am of opinion that the person appointed under a will and to whom Abishekam has been performed becomes the heir presumptive, entitled to succeed to the headship on the happening of a vacancy. Mr. Srinivisa Aiyangar relied strongly on *Sitapershad* v. *Thakur Dass* [1]. In that case, the right of appointment vested in the incumbent in possession. The Mutt was a mourosee Mutt, an incident of which was the right of selecting a successor vested in the Mahant for the time being. The report does not show that

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1. (1879) 5 C. L. R. 73.

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after the process of selection any ceremony was gone through by which the nominee became sanctified and competent to initiate disciples. Moreover, it was found in that case that the successor was found guilty of immoral conduct which led to his supercession. Mr. Justice Prinsep lays down too broadly in my opinion that the appointee holds his position "until the appointment has been declared to be a bad appointment and invalid." The learned Judge would give this right of declaration absolutely to the appointer. The facts of the case before the learned Judge might have justified that view. But I am not prepared to accept it as a general rule of law governing succession in similar institutions. Reference is made among the cases cited in argument to a decision of Glover and Romesh Chunder Mitter, JJ. to the effect that the appointment cannot be cancelled. The decision has not been reported and is not available for reference. *Samarendra Chandra Deb* v. *Birendra Kishore Deb* [1], was next relied on. In that case it was found that the Tipera Raj was entitled to nominate his successor as Job Raj from among the members of the family. It was not denied that the person so nominated would succeed to the Raja if he survived him. But it was contended that as the right of succession was contingent upon the plaintiff surviving the reigning prince, a suit for declaration will not lie. There were other important questions raised in the case. The Full Bench after deciding that the Calcutta Courts had no jurisdiction, held that the plaintiff was not entitled to a declaration. It is doubtful whether this decision is correct, having regard to the ruling of the Court of Appeal in England in the Law Times Reports and to the provision and illustration to S. 42 of Specific Relief Act. The Calcutta High Court accepted the principle of the previous decision in *Beerchunder Manikkya* v. *Rajcoomar Nobodeep Chunder Deb Burmono* [2]. However that may be, these decisions are not authorities for the position that a junior Pandarasannadhi has not a recognised status which he can protect when that status is denied. *Sellappaswamy* v. *Manikkaswamy* [3], was disposed of on the failure to plead the proper cause of action and is not a considered authority binding on us.

The English decisions to which our attention was drawn by the learned vakil only lay down that the power to appoint carries with it the power to dismiss. That position is not denied here.

1. (1908) I. L. R. 35 C. 777. 2. (1883) I. L. R. 9 C. 535 at 553.
3. (1911) M. W. N. 359.

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The power no doubt can be exercised for good cause shown; and especially in religious institutions where the appointment carries with it a certain dignity and is construed by worshippers as implying sanctity of the person, it would lead to disastrous results to hold that the appointee is dependent for his position on the will of the appointer. The attempt to show that the usage of the institution warrants the arrogation of such extraordinary powers has not been successful. The observation of the Subordinate Judge in MMM does not find support in the Appellate Judgment Ex. A. Exs. SSSS series only show that the junior Pandara is subordinate to the Pandarasannadhi. I am clear that the usage of the institution does not justify the claim made on behalf of the appellant. On the other hand, there are numerous instances in this Presidency of the junior being regarded as the unquestionable successor to the office. The consciousness of the people is entirely opposed to the contention advanced in this behalf. This being my view, I do not consider it necessary to examine at any length the English decisions quoted by the appellant. In *Marquis of Abergavenny* v. *Bishop of Llandaff* [1], there was an absolute discretion given to the appointer. In *The Queen* v. *Manchester and Sheffield Railway Company* [2], the appointment was to be during the pleasure of the person appointing. On the other hand, it was held in *Wright* v. *Zetland (Marquis)* [3], appointees who held office during pleasure should not be removed without good faith. In a very elaborate judgment Bashyam Aiyangar, J compares the position of the head of the Mutt to a Corporation Sole and says that " as in the case of a bishopric, perpetual succession in a Mutt is secured by the provision for nomination of a successor." Doubts have been cast upon certain *dicta* in this decision in relation to the rights of property possessed by the head of the Mutt, but I do not think the principle which is enunciated in this sentence has even been taken exception to. My conclusions on this point of the case are:—(*a*) that the head of the Mutt is entitled to appoint a junior Pandarasannadhi, (*b*) that this junior has a recognised status, (*c*) that he is entitled to succeed to the headship, if he survives the appointer, (*d*) that for good cause shown he can be removed, (*e*) that the tenure of his position is not dependent upon the good will of the appointer and (*f*) that it is not open to the head of the Mutt to dismiss him arbitrarily.

1. (1888) 20 Q. B. D. 460.
2. (1854) 4 El. & Bl 88.
3. (1908) 1 K. B. 63.

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The next branch of Mr. Srinivasa Aiyangar's argument was directed to showing that the appointer is the sole Judge for ascertaining whether the appointee is guilty of conduct which disentitles him from continuing to hold on, and that Courts are not competent to scrutinise his reasons or to question his discretion. There have no doubt been cases where it has been held that the sufficiency of the reasons is not for the court, *Hayman* v. *Governors of Rugby School* [1] and *Hill* v. *The Queen* [2]. In another class of cases it was held that where a club or association is proprietory, dismissal from it need not be after enquiry, *Baird* v. *Wells* [3]. It was contended that this Mutt was a voluntary association and that consequently the head of the association had plenary powers to expel a member including the junior Pandarasannadhi. I do not grant the premises. The origin of these Mutts has been explained elaborately by Sir Arthur Collins and Muthusami Aiyar, JJ in *Gyana Sambandha Pandara Sannadhi* v. *Kandasami Thambiran* [4]. It is enough to state for the purpose of this case that they are not voluntary brotherhoods. They owed their existence in most cases to the piety of the ancient Rajas who founded Mutts to impart religious instruction; in some cases, the special sanctity of individuals was availed of by disciples to endow property to the institution founded in his name and honour. The fact that the Pandarasannadhi has a synod of Thambirans from whom he selects his successor does not make the Mutt a voluntary association. They are not proprietory clubs in the sense in which Stirling, J. uses the term in *Baird* v. *Wells* [5]. *Green* v *Howell* [6], only construes the articles of the association as conferring unrestricted powers of expulsion. On the other hand, in *Willis* v. *Gipps* [7], the dismissal of a Judge without enquiry by the Colonial Governor, although the Judge held office only during the pleasure of the Queen was held invalid by the Judicial Committee. The general principle is well-established that no one who has a recognised status or office can be removed for misconduct without giving him an opportunity to show cause against his removal. I am therefore of opinion that the cancellation of the appointment is of no effect by itself. In this connection I cannot help

1. (1874) 18 Eq. 28.
2. (1854) 8 M. P. C. 138.
3. (1890) 44 Ch. D. 661.
4. (1887) I. L. R. 10 M. 375.
5. (1890) 44 Ch. D. 661, 677.
6. (1910) 1 Ch. 495.
7. (1846) 5 M. P. C. 379.

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expressing my regret that theSubordinate Judge should have declined to receive evidence on two of the issues in the case. In a case of such magnitude which engaged the attention of the Court for over 6 months, every part of the case should have been heard and adjudicated upon. However I agree with the learned Chief Justice that this case can be disposed of on the materials on the record.

Closely connected with the argument that the defendant could have been removed by Sivagnana without notice was the contention that the defendant forfeited his rights by the various acts of misconduct alleged against him, Ex. K. I am in agreement with Mr. Srinivàsa Aiyangar that if the head of the Mutt or the junior is proved to be living an immoral life, he is liable to be removed. There can be no condonation of such an offence as in the case of breach of trust by trustees where it has sometimes been held that the full leach should be given an opportunity to mend his ways before bringing in an empty leach to feed on the trust resources. Celibacy and a scrupulous avoidance of sexual indulgences are of the essence of the position held by these persons. Devotees of both sexes resort for initiation to them and it would cut at the root of the whole system, if the heads of the Mutts are permitted to live profligate lives. In the Narada Smrithi, it is stated "राज एव हि दास: स्यात् खलः प्रव्रजतोऽपि सन् ॥". This power possessed by the king is delegated to the Courts: and when a clear case is made out that a religious ascetic who ought to set an example of sexual purity is leading an immoral life, the courts will find no difficulty in dismissing him from office. But it does not follow that suspected immorality entails forfeiture. This would lead to complications and would encourage baseless insinuations. Until the accusation is openly made and found, the incumbent should not be disturbed from his office. The learned Vakil has quoted no authority for the extreme contention that a forfeiture is incurred by an ascetic's immoral conduct.

I agree with the Subordinate Judge that the relinquishment by Sivagnana did not deprive him of his religious office. I understand Ex. S in the same way as he does. Moreover I am not satisfied that Sivagnana was a free agent at the time of the release.

The real point on which the defendant's right rests is the compromise evidenced by Exs. P 1 and 2. The facts leading up

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to the compromise are fully stated by the Subordinate Judge. The learned Judge in one place seems to suggest that the pendency of the criminal prosecution for defamation against Sivagnana was one of the factors which led to the compromise. The evidence of Mr. Krishnaswami Aiyangar which I see no reason to disbelieve makes it clear that Sivagnana was harassed in all ways, that he was an imprudent manager, had incurred heavy debts, found it impossible to carry on his religious and secular duties owing to the number of claims made against him and that he sought relief from all this worry by making the defendant the virtual manager of the institution. He had competent advisers and influential adherents. I do not believe that the defamation case in any way affected the compromise. After all it was a compoundable criminal offence. I do not agree with the contention that the compromise was vitiated by any agreement to stifle prosecution. The next contention of Mr. Srinivasa Aiyangar is that as the compromise decree included an injunction restraining Sivagnana from making an appointment of a junior Pandarasannadhi under all conceivable circumstances, the decree is invalid altogether. It is true that the last clause is bad. As I have said already, the defendant was liable to be removed for good cause shown against him or he might die in the lifetime of the head of the Mutt. Therefore it was not competent to the Subordinate Judge to grant an injunction permanently depriving Sivagnana of the exercise of his power of making a fresh appointment. But, in my opinion this portion of the decree is severable from the anterior portion. The first part of it confers a right on the defendant; the second part enforces an illegal disability. The two are not so mixed up as to be inseparable. The true principle applicable to mixed stipulations of this nature has been thus stated by Lord Esher in *Kearney* v. *Whitehaven Colliery Co.* [1], to which Mr. Sadagopachariar drew our attention; "If the consideration, or any part of it, is illegal, then every promise contained in the agreement becomes illegal also, because in such a case every part of the consideration is consideration for the promise. But suppose there is nothing illegal in the consideration; then upon that valid consideration may be several promises or liabilities. If any one of those be in itself illegal, then it cannot stand, not because the consideration becomes illegal, but because

1. (1893) Q. B. 700.

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the promise itself is illegal. It is a bad promise which cannot be supported by the consideration. But the other promises which are good and legal in themselves remain, and can be supported by the good consideration. The rule of law has long been acted upon, and it was applied by the House of Lords in the *Netherseal case* [1]; " See also *Newman* v. *Newman* [2]. S. 24 of the Contract Act is not against this view. I am therefore of opinion that the portion of the decree enjoining Sivagnana not to make any appointment at all can be severed from that portion of it which recognises the defendant's appointment. We have next to see whether as contended before us, Sivagnana was not competent to enter into this compromise. The objection is based on the ground that as the head of the Mutt sues or is sued on behalf of the trust, he has no power to accept a compromise to the prejudice of the institution. Before dealing with the law bearing on the subject, it may be stated that in my view the compromise did not affect the usage of the institution in any way. By the compromise Sivagnana was only recognising a person who was entitled to succeed had there been no aspersions on his character. Sivagnana in the compromise withdrew from the position of antagonism which he had taken up against the defendant. He was apparently advised that there was no justification for his attitude towards the defendant; and the compromise decree was only an act of reparation.

In *Gyana Sambanda Pandarasannadhi* v. *Kandasami Thambiran* [3], a compromise regulating the course of succession to the Mutt was recognised as it was in consonance with the usages of the institution. Mr. Sadagopachariar also quoted *Nilakandhen Nambudripad* v. *Padmanabha Revi Varma* [4] in support of this position. In the Kamudi case, *Sankaralinga Nadan* v. *Rajeswara Dorai* [5], the compromise by the Rajah of Ramnad was distinctly against the usage of the institution and in the teeth of the decree recognising the usage. There are no English cases directly in point. It was held in *Attorney-General* v. *Leanderfield* [6] that an agreement between the next of kin and the Governor of the charity to share the estate in a particular proportion should be given effect to by the Court." In Tudor's

1. (1888) 20 Q. B. D. 606; on appeal (1889) 14 A. C. 228.
2. (1815) 4 Maule & Selwyn 66. s. c. 105 E. R. 759.
3. (1887) I. L. R. 10 M. 375. 4. (1894) I.L.R. 18 M. 1. s.c. 4 M.L.J. 233.
5. (1908) I.L.R. 31 M. 236. (P.C.) 6. (1743) 9 Mod. 286; s.c. 88 E. R. 456.

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Charitable Trusts numerous authorities are cited for the position that questions relating to the interests of a charity may be compromised (see p. 378).

In all such cases, the matter will be brought to the notice of the court and its sanction will be obtained for the compromise. I do not see why the same principle should not be applied to the present case. It was said that the mere acceptance of a compromise by the court is not proof of its sanction, and the case of minors was instanced. In the case of infants, there is a statutory prohibition and a direction to observe certain formalities. It is not analogous to this case. Reliance was mainly placed upon the authorities which lay down that a trustee should not transfer his office to persons in the immediate line of succession. In Madras, although there is a course of decisions sounding that way, Mr. Justice Bashyam Aiyangar in *Ramanathan Chetty* v. *Murugappa Chetty* [1], was not prepared to regard it as settled law. The Bombay High Court has taken a different view. It is not necessary in this case to express any opinion on this question as I am of opinion that those cases afford us no guidance. The alienation of the Office of Trustee in most of the cases quoted before us was vitiated by considerations personal to the parties concerned. But where the object of the agreement is to recognise the usage of the institution and to accept the validity of an appointment which but for the conduct of Sivagnana would have in the ordinary course of events given the defendant the right which was secured to him by the decree. I see no reason for holding that the decree based on such an agreement is illegal. I do not therefore think it necessary to examine the cases quoted by Mr. Srinivasa Aiyangar.

Mr. Sadagopachariar argued that the compromise was binding on the parties until it was set aside and as Sivagnana died before that happened, his rights were unaffected by the suit. It was held in *Great North West Central Railway* v. *Charlebir* [2], that a decree based on compromise was of no greater validity than the contract. If the observations in *Rajah Kumara Venkata Perumal Raja Bahadur* v. *Thatha Ramaswami Chetty* [3], are against the view, I am not prepared to follow them. At the same time, it is well-settled that until the decree based on the compromise is recalled, it is binding on the parties to the suit. Lord

1. (1903) I. L. R. 27 M. 193 at 196=13 M. L. J 341. 2. (1899) A. C. 114
3. (1911) I L. R. 35 M. 75=21 M. L. J. 709.

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Esher in *The Bellcairn* [1] says "I agree with Butt, J., that when at a trial the Court gives judgment by the consent of the parties, it is a binding judgment of the court and cannot be set aside by a subsequent agreement between the solicitors." I take the reason of the rule to be that although the force of a consent decree is derived from the *consensus ad idem* of the parties, it having received additional validity by being accepted by the court, it cannot be set aside by the consent of the parties as any other contract could have been, but can only be vacated by the court by a proper proceeding in that behalf. The court of appeal in *In re South American and Mexican Banking Co.* [2] affirmed the principle stated in 10 Probate Division 161. It follows, therefore, that until and unless the compromise decree was set aside Sivagnana was bound by it and the defendant was entitled to the benefit secured to him under it. I agree with the Subordinate Judge in holding that the compromise is binding on Sivagnana.

The result of the above conclusions is that at the time that Sivagnana made the will and had Abishekam performed on the plaintiff, the position of the junior Pandarasannadhi was not vacant and consequently he had no power to appoint the plaintiff to it. I have, of course, assumed that the will was made and that the Abishekam was performed. I have given my reasons already for not believing the story in that behalf. The plaintiff is not therefore the legal representative of Sivagnana. The appeal fails and must be dismissed with costs.

Appeal No. 22 of 1911 and C. R. P. No. 25 of 1911 follow.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice and Mr. Justice Phillips.

The Madras Times, Printing and Publishing Company, Limited. ... *Appellant* *

v.

C. H. Rogers ... *Respondent.*

The Madras Times, Ltd. *v* Rogers.

Libel—Fair comment—Statement of fact and comment—Well founded criticism—Meaning of—Statement of facts unessential—May be identified by reference.

Even a statement of fact may be excused if honest and fair, as comment if it appears to be a deduction or conclusion come to by the writer from the facts stated or referred to by him or in the common knowledge of the person writing and those

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* O. S. A. No. 60 of 1914. 30th November 1915.

1. (1885) 10 P. D. 161. 2. (1895) 1 Ch. 37.

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to whom the words are addressed provided the conclusion is one that can be reasonably come to on the facts.

For the plea of fair comment to be available, it is not necessary that the facts on which the inference is based should be specifically stated; it is sufficient if those facts are identified by clear reference.

Whether a particular statement is a statement of fact or is a comment, is a question of fact to be determined with reference to the circumstances of each case.

The statement that criticism must be well-founded, means no more than that it must be such that a fair minded man might upon the facts *bona fide* hold the opinion expressed.

On Appeal from the decree of the Honourable Mr. Justice Sankaran Nair, in the ordinary Original Civil Jurisdiction dated 30th March 1914 in Civil Suit No. 119 of 1913.

The facts are fully set out in the Judgment.

C. P. Ramaswami Aiyar and *A. Duraiswami Aiyar* for the Appellants.

Sydney Smith instructed by Short and Bewes for the Respondent.

The Court delivered the following

The Chief Justice.

Judgment:—*The Chief Justice*:—This is an appeal against the Judgment of Sankaran Nair, J. giving the plaintiff a decree for Rs. 3,000 as damages for an alleged libel published by the defendants, the Madras Times, concerning the plaintiff. The learned Judge held that the published matter was defamatory of the plaintiff, that the justification pleaded was not proved, and that the defendant was not protected by the plea of fair comment.

It is with regard to this last point that this case has been mainly argued on appeal, and it will therefore be as well to set out the passage in which the learned Judge may be said to have directed himself as to the way in which this plea was to be dealt with: "This rule of fair comment itself indicates its limitations. The defendant was only entitled to express his opinion on facts which are true. His assertion of facts on which his comments are founded must be correct; for instance, in this case he must prove this statement that the plaintiff fomented the strike and tried to stop the conference. The plea of fair comment protects only what purports to be a comment on fact and not those statements of facts."

Nor was the defendant entitled to make any imputation on the plaintiff's moral character, unless he is prepared to justify it by proving it to be true. Imputation of sordid and dishonest motives has to be justified. The writer's opinion must be shown to be well-founded, and a correct inference from the facts commented on. For the decision in this case it is necessary

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to keep this in mind. If the defendant had truly set forth in the article what the plaintiff or the society had done and then stated that such conduct shows him to be dishonest or mischievous, or that it shows that he must have been actuated by sordid motives, the defendant would be within his rights to make the imputation. He has only to prove, if it is denied, that the plaintiff has committed the act alleged to have been done by him. The reason is that if the defendant's opinion is erroneous the article carries with it the antidote as it enables the reader to form his own conclusion. But if, without giving his reasons, he only says that the plaintiff has been actuated by sordid motives, then he has to prove the facts from which such inference might be reasonably drawn. He has to prove, in fact, that his inference is correct. It is not enough for him to prove facts which might raise a suspicion, or plead that it was a conclusion which an honest person might arrive at; because he has already done the mischief. If the facts were capable of suggesting two inferences, he should have stated the facts on which his comment was based and the statement must only appear as an expression of opinion on these facts As stated by Lord Atkinson in *Dakhyl* v. *Labouchere* [1] "A personal attack may form part of a fair comment upon *given* facts truly *stated* if it be warranted by *those* facts.... Whether the personal attack in any given case can reasonably be inferred from the *truly stated facts upon which* it purports to be a comment." See also Odgers on Libel page 203 where he points out that where the defendant only states a bare inference without the facts on which that inference is based such inference will have to be treated as an allegation of fact which will have to be proved. It will not be treated as a comment." Now with all respect it seems to me that the learned Judge has laid down the law applicable to the present case somewhat too strictly. In saying that the defendant's assertion of facts on which his comments are founded must be correct and that he must prove that the plaintiff fomented the strike and tried to stop the conference he does not appear to have sufficiently considered that though in form, statements of facts, such statements may in the circumstances of the case amount to no more than comments. Further, when the learned Judge says that to justify the imputation of motives it is necessary that the defendant should set out in the article all the facts upon which the imputations are founded

1. (1908) 2 K. B. 325 329.

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that I think is going too far. It is clear, as said by *Kennedy, J.* in a passage which has since been cited with approval, that "the defendant must not misstate facts and then proceed to comment on facts so untruly stated." But in the course of public discussions on matters of public interest proceeding in the press from day to-day, it would be obviously too much to expect that the writer in each article should set out all the facts upon which his comment is based including admitted facts which are within the knowledge of every one interested in the question. That would be carrying the law further than it has ever been carried, and I do not think Dr. Blake Odgers intended to go to these lengths in the passage referred to by the learned Judge, as such a view would not be consistent with an earlier passage of his treatise in which he sets out what I believe to be the law: "Sometimes, however, it is difficult to distinguish an allegation of fact from an expression of opinion. It often depends on what is stated in the rest of the article. If the defendant accurately states what some public man has really done and then asserts that "such conduct is disgraceful" that is merely the expression of his opinion, his comment on the plaintiff's conduct. *So, if without setting it out, he identifies the conduct on which he comments by a clear* reference. In either case, the defendant enables his readers to judge for themselves how far his opinion is well-founded: and, therefore, what would otherwise have been an allegation of fact becomes merely a comment. But if he asserts that the plaintiff has been guilty of disgraceful conduct, and does not state what that conduct was, this is an allegation of fact for which there is no defence but privilege or truth."

The distinction is well brought out in one of the cases quoted by Dr. Odgers, *O'Brien* v. *The Marquis of Salisbury* [1] which belongs to the same class of cases as the present case. Field, J. there laid down the law as follows :—"It seems to me as indeed I suggested during the argument—that comment may sometimes consist in the statement of a fact and may be held to be comment if the fact as stated appears to be a deduction or conclusion come to by the speaker from other facts stated or referred to by him, or in the common knowledge of the person speaking and those to whom the words are addressed and from which his conclusion may be reasonably inferred. If a statement

1. (1889) 6 Times L. R. 133, 137.

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in words of a fact stands by itself made *without reference, either expressed or understood, to other antecedent or surrounding circumstances notorious to the speaker and to those to whom the words are addressed*, there would be little if any, room for the inference that it was understood otherwise than as a bare statement of fact, and then, if untrue, there would be no answer to the action; but if although stated as a fact, it is preceded or accompanied by such other facts, and it can be reasonably based upon them, the words may be reasonably regarded as comment, and comment only and, if honest and fair, excusable; and whether it is to be regarded as fact or comment is a question for the jury, to be determined by them upon all the circumstances of the case" and in the very case of *Dakhyl* v. *Labouchere* [1] cited by the learned Judge where the defendant in his paper, had described the plaintiff as "a quack of the rankest species" but had failed to prove it at the trial, the House of Lords set aside the verdict for £ 1,000 damages and ordered a new trial because the jury had not been directed to consider whether the statement did not exceed the limits of fair comment.

To come now to the facts of the present case, the article in question was published during the course of a dispute between the Madras and Southern Mahratta Railway and its employees at a time when a strike was threatened but had not yet taken place. Sometime previously the plaintiff who till then had no connection with railways had become the salaried General Secretary of the Amalgamated Society of Railway servants in India, Burma, Limited, which had its headquarters at Bombay. The bulk of the M. and S. M. workmen were admittedly subscribers to the Association, which was designed to promote the interests of Railway servants in India and to provide them with strike pay in the event of a strike being considered necessary. The plaintiff in the course of the dispute had come to Madras, and had endeavoured to represent the men in the dispute with the Railway, an interference which the railway refused to allow. On the 10th April 1913 he delivered a speech at Rayapuram, Ex. XII, in the course of which he stated among other things that the Agent would not consent to his leading the deputation and to the fact that the men had in consequence refused to meet the Agent. He said he was thoroughly in agreement with the men, and went on

1. (1908) 2 K. B. 325 (n) 329.

to suggest that the best solution of the difficulty would be to ask the Agent to receive a written petition which they could have written by any one they chose.

On the 24th of April the M. & S. M. Railway issued a statement Ex. VII which was published in the press, in which they set out a telegram which they had received from the plaintiff on the 22nd April in the following terms:—" Am directed by Trustees to request you to be good enough to grant definite reply to men's petition before 1st May and to inform you that unless wages of Traffic Department are enhanced and Brakesman Rangaswami reinstated, a general strike will result. Men have suffered for years and their formal petition has been in your hands since 10th instant." On the afternoon of the 24th the plaintiff delivered a speech to the men; Ex. (26) XXVI in which he said "lapse of time has proved that the Agent is unyielding and this fact coupled with the overt attempts by the officials to bring the society into discredit has forced the society to support the members' desire to strike if the Agent does not give a definite reply to their petition before the 1st May 1913 and if the wages of the Traffic Department are not enhanced and if Brakesman Rangaswami is not reinstated." The speaker then proceeded to urge the men to stand by the Association.

It was on the following morning of the 25th April that the defendants published the alleged libel in their paper. It was in the following terms: "Wisely conducted it is possible that trade unions sometimes serve a useful purpose. When, however, they fall into the control of born agitators like the Mr. Rogers who has lately been so prominent in connection with the M. & S. M. Railway dispute, their influence becomes purely mischievous. Men of the same type who have no inherent sympathy for the class they mislead, but who turn agitators purely for what it brings them in the shape of money and notoriety such men were once fairly familiar as trade union officials at home but latterly they have been the subjects of a general clearance. The real purpose of the attempt to foment a strike is fairly clear, *viz.*, to advertise the trade union, and particularly its Secretary."

"But what good has the agitation brought to the men? The Conference called by the Agent was called on his own initiative. Why did Mr. Rogers try to stop it? For two reasons, the first being because it seemed likely to settle the men's grievances which

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would have deprived the Society of its *raison dètre* and secondly because this admirable accomplishment would have been brought about without Mr. Rogers being able subsequently to proclaim that 'alone I did it'. The overweening egotism of the man has been made evident in his speeches, and we can only say that if the men of the M. & S. M. Railway allow themselves to be led into rash conduct by such a person they will command little public sympathy. As a pretext for a strike, the case of the man Rangaswamy is the most trivial, we remember coming across. The only possible explanation is that Mr. Rogers and his society have come here to use the M. & S. M. employees for their own purpose."

We have next to determine as laid down by Field, J. upon all the circumstances of the case whether the several statements are to be considered as consisting of fact or comment. The question of the impending strike was one of great public interest affecting not only the Railway and its employees but also the whole public of Madras and was such as to invite and justify the fullest and freest discussion. The fact that the article begins with a reference to the imminent part taken by the plaintiff in the dispute indicates to my mind that it was intended as comment on facts which were common knowledge, and in view of the speech of the 10th, Ex. VII, which had been published in the papers, it seems to me that the writer of the article was well-warranted in forming and expressing the opinion that the plaintiff had endeavoured to stop the Conference, and in view of the plaintiff's telegram to the Agent of the 22nd, Ex. VII which was then before the public I think he was also well-warranted in forming and expressing the opinion that the plaintiff was fomenting the strike, and that both these statements are covered by the plea of fair comment. As regards the other statements in the article while the plaintiff though previously unconnected with Railway work was fully entitled to accept the well paid post of managing secretary of this Association and as such to champion the interests of the servants of the Madras and Southern Mahratta Railway and to give them such advice as he thought proper, it must also be borne in mind that in so doing he necessarily made himself a public character exposed to public criticism and invited the fullest canvassing of his conduct and his aims in such matters as his advice

to the men not to meet the Agent without him and to strike unless their demands were conceded. In a well-known passage in *Warson* v. *Walter* [1], Cockburn, C.J. speaks of "the full liberty of public writers to comment on the conduct and motives of public men," and in *Campbell* v. *Spottiswoode* [2], the same learned Judge lays down that "where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct so that a jury shall say that the criticism was not only honest, but also well-founded, an action is not maintainable." And as I have already pointed out in *Ramakrishna Pillai* v. *Karunakara Menon* [3], where the more recent cases are collected the statement that the criticism must be well-founded has been held in *Peter Walker and Son Limited* v. *Hadgon and Son Limited* [4], to mean no more than that "a fair minded man might upon those facts *bona fide* hold that opinion."

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Applying these tests to the present case, I think the writer of the article was warrented as a matter of comment in stating in effect that Mr. Rogers' recent action in connection with the Railway dispute showed him to be a born agitator, if tha is defamatory. The next sentences refer to the fact, which was well-known, that Mr. Rogers had no connection with Railways until he joined the association, and what follows appears to me to amount to comment on Mr. Rogers' action, which was well within the knowledge of the public, in advising the men not to meet the Agent in conference unless he was allowed to represent them and in subsequently advising them to strike if their demands were not conceded. It is true that the article as a whole imputes to Mr. Rogers that he was actuated by regard more for his own interests than for the interests of the men. This is a stock accusation against all persons in the position of Mr. Rogers, and may be parellelled by the equally hard things which are usually said of the employees on such occasions by those who sympathise with the men. Such statements, so far as I know, have never been held actionable. The language no doubt is strong; but if the writer believed that Mr. Rogers' activities were mischievous, he was entitled to express himself forcibly with a view to dissuading the men from

1. (1868) L. R., 4 Q. B. 73 at 93 B. 2. (1863) 3 B. & S. 769 at 776, 777.
3. (1913) 25 M. L. J. 476. 4. [illegible] 263.

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following him and so averting a strike. In the result I cannot say that the bounds of fair comment have been exceeded and we must therefore reverse the decision of the learned Judge and dismiss the suit with costs throughout. The money paid money into court will be paid out to the defendants.

Phillips, J:—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Coutts Trotter and Mr. Justice Srinivasa Aiyangar.

Sree Raja Dantalooru Pedda Venkata Jagannadha Raju Bahadur Garu and another. *Appellants** (*Plaintiffs 1 and 2*)

v.

Kurlapathi Radhakrishniah and another. *Respondents* (*Defendants 1 and 2*).

Sree Raja Dantalooru Pedda Venkata Jagannadha Raju v. Kurlapathi Radhakrishniah.

Registration Act, S. 17 Cl. (b), Sub-Section V cl. (2)—Evidence Act, S. 92 Registered lease-deed—Unregistered document executed on same date as lease deed and providing for cancellation and delivery of lease deed to lessor and for execution of release deed by lessee—Suit by lessor for cancellation and delivery of lease deed not for execution of release deed by lessee—Admissibility of unregistered document in evidence—Conditions of grant of relief to lessor—Restoration of benefit under lease deed—Pleadings—Relief not specifically asked for in plaint—Defendant not misled—Effect.

Where the plaintiffs sued (1) for the cancellation and delivery to them of a registered lease deed executed by them in favour of the defendants and (2) for a decree directing the execution by the defendants in their favour of a deed releasing their rights to the property covered by the said lease deed, and relied, in support of their claim, upon an unregistered document of even date with the said lease deed given to them by the defendants and providing, in certain events which happened, for cancellation and delivery to the plaintiffs of the lease deed and for the execution of a release deed, *held* that the unregistered document was not inadmissible in evidence either under S. 17 (b) of the Registration Act, or under S. 92 of the Evidence Act.

Held, further that the plaintiffs were bound to restore to the defendants the benefits that they had obtained under the lease deed.

Per Coutts Trotter, J:—Where, although the exactly appropriate relief is not asked for in the plaint, the defendant knows clearly what it is that is in issue between himself and the plaintiff and goes to trial on that point the appropriate relief may be granted notwithstanding the defect in the plaint.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Bezwada in O. S. No. 18 of 1912 dated 24th September 1913.

P. Narayanamurthi and *B. Somayya*, for the Appellants.

T. Rangachariar, *G. Krishnaswami Aiyar* and *K. Krishnaswami Aiyangar* for the Respondents.

* A. No. 96 of 1914. 10th November 1915.

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Coutts Trotter, J.

The Court delivered the following

Judgments:—*Coutts Trotter, J.*:—This is an appeal by the plaintiffs from the Judgment of the Subordinate Judge of Bezwada dismissing their suit and refusing them the reliefs they asked. The facts out of which the suit arose are these:—The plaintiffs are the proprietors of an estate known as Gundepalli estate which was apparently of considerable extent, and in the year 1911 they were extremely hard pressed for money. Their lands were mortgaged to the extent of something like two lakhs and they were indebted to sundry personal creditors in sums which amounted more or less to another lakh; and they were naturally anxious to borrow money in order to discharge those liabilities and disencumber their lands. Sometime in the early part of 1911 they seem to have got in touch with the defendants who are sowcars in Madras. Various proposals were made first by sale and then by mortgage for a comparatively modest loan of Rs. 15,000, and then as the negotiations developed, it became obvious that so modest a sum could afford no substantial relief to the embarrassments of the plaintiffs and thereupon a proposition was set on foot, of the defendants finding a lender of three lakhs of rupees for which the defendants were to receive a commission. The original figure seems to have been fixed at 4 per cent. The negotiation went on. The plaintiffs were continually pressing for news as to whether the loan had been arranged and the defendants were constantly holding out hopes that a loan would very soon be arranged, and so matters went on until the 11th of September 1911. In that month the plaintiffs leased to the defendants a considerable piece of property out of their Kamatam lands at a rental Rs. 500 per annum. On the same date, according to the plaintiffs' case, they were given by the defendants a document, which is Ex. S in the case, of which the important clause is the last which is in these terms. "If the said loan (that is, the loan of three lakhs to which I have alluded, could not be given to you for any reason, I shall have the said patta and muchilika (that is the lease of even date to which I have referred) cancelled and execute a deed of release in your favour." That was signed by the 2nd defendant. It is not disputed that he had authority to bind his co-defendant. Now the plaintiffs' case is this: that the lands comprised in the patta yielded a revenue very greatly in excess of the Rs. 500 rental to be paid by the defendants, and that

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the difference between the rent they were paying and the realizable rent, which they put at Rs.1,500 and which the learned Judge accepts as worth at least Rs.1,200 was to be in lieu of the commission which would otherwise have been payable to the defendants on finding the desired lender. Now in fact the lender was never found. The defendants suggested that one of them had a wealthy father-in-law who was on the verge of lending money. Whether that be so or not it is impossible now to say. Having regard to the fact that hopes were held out to the plaintiffs' who it is obvious from the correspondence, were very helpless and unbusinesslike people, that the loan would be given at a rate not more than 4 per cent. per annum, I think it extremely questionable whether the whole of the defendants' story as to the readiness of the father-in-law to come forward was not a mere bait to induce the plaintiffs to do that which they did. In fact, as I have said the loan was never made, so that the plaintiffs got nothing and the defendants were of course never in a position to earn their commission. The case of the plaintiffs' is based upon Ex. S. They ask that, as the loan has never been granted to them, the Court should relieve them by ordering the defendants to carry out their covenant in Ex. S and execute a deed of cancellation of the lease and a deed of surrender to the plaintiffs. The defendants' case raises two issues, one of fact and one of law. The issue of fact is as to the genuineness of Ex. S which the defendants ask us to believe was a forgery. It is conceded, and we think it is manifest to the eye, that if the signature to Ex. S is a forgery it is an extremely good one. Its likeness to the admitted signatures of the 2nd defendant is extremely striking, so much that the learned Judge in stigmatising this document as a forgery does not suggest that the signature is forged, but makes the suggestion, which as far as I can see was never suggested in the cross-examination and of which there is nothing even in outline, in the evidence-in-chief for the defence that it is not unlikely that the 2nd defendant may have given one of the witnesses for the plaintiffs a blank paper with his signature, in connection with certain criminal proceedings that were then in the air. All I can say is that that seems to me a wholly gratuitous suggestion and one which a court of law ought not to indulge in for the purpose of branding litigants with the inculpation of a criminal forgery. The person upon whom this stigma is personally cast, the 5th witness for the plaintiffs,

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was never asked a single question about it in the cross-examination, nor was any question put to the 1st plaintiff who went into the box imputing complicity in any such scheme. I think that it would be acting contrary to judicial principle to hold Ex. S on the materials before us to be a forged document. The probabilities seem to me to be all against its being a forged document. If it were, then we must suppose that the plaintiffs handed over these valuable lands to the defendants without a farthing worth of security that they would get anything whatever in return for them. It is quite true, as Mr. Rangachari said, that they were in bad case. It is quite true they were unbusinesslike people; and it is quite possible that the defendants were ready to take any possible advantage of them that they could. But at the same time I cannot bring myself to believe that they went so far as to give away the whole of the lands that were the recompense of the defendants without a saving clause to ensure that they got something in return for what they gave. It is said that the letters contain no reference to this agreement Ex. S either before or after the 11th September. I have perused those letters, and it is quite true that they do not refer to this agreement. But they bear the stamp of being written by men hard pressed for money solely anxious to beseech the defendants to try and get a loan and extricate them out of the mire into which they had fallen. I hold that Ex. S was a genunine document and represented a genuine transaction.

Then Mr. Rangachari says, even if it be so, it is in law void and of no effect, because he says the lease is a registered document and it cannot have its effect varied or altered by an unregistered document which Ex. S admittedly is; and he relies for that proposition upon various portions of S. 17 of the Registration Act. He says that the effect of Ex. S is to limit or extinguish a right, title or interest in immovable property of the value of Rs. 100, that is sub-section (b) of S. 17. He further says that if it does not fall within that, it falls within sub-section (c) of the same section as being an instrument acknowledging the receipt of consideration on account of the declaration or extinction of such right or interest in immovable property. The plaintiff's case is that the apt clause of the section is sub-section V of cl. (2) of S. 17 which exempts from the necessity of registration a document which does not itself create or extinguish any

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right such as I have described in immovable property, but merely creates right to obtain another document which will when executed create or extinguish such right. He also relies on S. 92 of the Evidence Act, and says that Ex. S is a violation of the rule there laid down, that the lease is a document which contains all the terms of the contract, and that Ex. S falls within the mischief of that section, because it is called in evidence for the purpose of adding to or subtracting from it does not matter which way it is put—the terms of the lease. He cited a great many authorities to the effect that an unregistered document is not admissible in evidence, which qualifies the effect of a registered document or adds to or varies its terms. With that proposition, I am in complete accord. The only point where I differ is that I do not think that any of these cases apply, because I do not think the present case can properly be put in any way as a violation of the principle laid down either in the Registration Act or S. 92 of the Evidence Act. In my opinion Ex. S though no doubt in the widest sense part of the same transaction as the lease and indeed the word that I am going to apply, namely, 'collateral' implies in itself that it subserves in some part the same purpose, though as I say it forms a part of the larger transaction of which the lease forms another part, is in my opinion wholly independent of the lease or of any of its terms. For that view of the document, I rely upon two decisions, one a decision of the Privy Council *Subramaniam Chettiar* v. *Arunachallam Chettiar* [1], and the other known case of *De Lassalle* v. *Guildford* [2]. Mr. Rangachariar pointed out that *De Lassalle* v. *Guildford* [2], was not a suit for specific performance but an action sounding in damages for breach of contract. That seems to me in no way to detract from its authority as to when in contemplation of law one document will be held to be a variance or derogation of another, and when it will be held to be embodying a collateral and distinct agreement. In my Judgment Ex. S is entirely collateral to the lease and was a document within the very terms of subsection V, cl (2) of S. 17 of the Registration Act, namely a document which does not itself create or extinguish a right in immovable property, but a document which gives the right to obtain another document which, and which only, will have that effect If the words of Ex. S are examined, they seem to me quite

1. (1902) I. L. R. 25 M. 603=12 M. L. J. 479. 2. (1901) 2 K. B. 215.

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incapable of any other construction. The words used are "I shall have the said patta and muchilika cancelled and execute a deed of release in your favour." That is the only operative portion of the document and how anybody can contend that the moment it was found that the loan could not be given, these documents became *ipso facto* void and of no effect I cannot conceive. If they were void and of no effect there was not the slightest reason for the patta and muchilika being cancelled by the defendants, and still less is there any need for a deed of release in favour of the plaintiffs. In my opinion this contention of the respondents is quite untenable, and I therefore hold that Ex. S is not a document requiring registration, and since it is only collateral to the lease, I think it is outside the operation of S. 92 of the Evidence Act, whether it be regarded as itself the contract, or as evidence of an oral agreement to the same effect.

The result is that Ex. S being an enforceable contract, the plaintiffs are entitled to the relief claimed. It is said that the plaint does not properly frame the relief to which the plaintiffs on the construction this court has adopted, are in law entitled. I think that is very likely right. I think the exactly appropriate relief, was not asked for, although the second head of relief claimed comes very near it inasmuch as the plaintiffs ask for cancellation of the patta and delivery of it to them. That is at any rate an appropriate statement of a portion of the relief they are entitled to. But even if I thought that the plaint wholly failed to ask in apt terms of art that which the plaintiffs are entitled to, that would not be the slightest obstacle to doing them Justice in the case, because it is perfectly obvious that the defendants knew absolutely clearly what it was that was in issue between them and the plaintiffs, and what the plaintiffs wanted; and the precise way in which it is framed is after all a mere question of words.

The result will be that the Judgment of the Lower Court will be reversed and the defendants will be ordered to cancel and deliver up the patta and muchilika and to execute a deed of release in favour of the plaintiffs. But they cannot of course obtain specific relief without putting the other parties in the position they were in before the transaction in question. The evidence of the defendants is that at the request of the plaintiffs they paid them two years' rent namely Rs. 1,000 in advance, and they got a receipt for the Rs. 1,000. The plaintiffs do not attempt to deny that they

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gave the receipt. They admit they gave the receipt but they ask us to believe that they gave that receipt without getting the money. We do not accept that story. Whether it is true or not it is impossible to determine, but if parties choose to execute formal documents acknowledging receipt of moneys which they have not received they have only themselves to thank if a Court of Justice binds them to their written word. Therefore the relief granted to the plaintiffs will be conditional on their refunding to the defendants the sum of Rs. 1,000 with interest at 6 per cent. per annum from the 4th October 1911 till payment. The appeal is allowed with costs throughout.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J:—I agree. I desire to add only this. I doubt whether S. 92 of the Evidence Act can have any application to this document, Ex. S. as I read it, is an agreement in writing. The plaintiffs do not desire to let in evidence of any oral agreement, because I think Ex. S is an agreement in writing and not merely a memorandum of a previously concluded oral agreement.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Coutts-Trotter and Mr. Justice Srinivasa Aiyangar.

Yechuri Ramamurthi ... *Appellant* * (*Plaintiff*)

v.

Yechuri Ramamma and others ... *Respondents* (*Defendants 1 to 5.*)

Yechuri Ramamurthi v. Yechuri Ramamma.

Hindu Law—Partition—Suit to set aside by member who was minor at the time and was represented by a natural guardian—Proof—Onus—Family arrangements—Principles of—Applicability to partitions—Joint family—Member—Earnings of—Self-Acquisition—Presumption.

A partition of the property of a joint Hindu family, some of the members of which are minors at the time and are represented by their natural guardians, is as binding on them as on the adult members, provided there is no negligence or fraud on the part of the guardians. In the suit by one of such minor members instituted after his attaining the age of majority to set aside the partition on the ground that it was unfair and prejudicial to his interest, the *onus* is on him to prove that it was unfair or prejudicial to his interests.

Principles applicable to family arrangements are applicable to partition among members of a joint Hindu family.

There is no presumption that the earnings of one member of a joint Hindu family belong to the family in the absence of any evidence that they were thrown into the common stock or that they were jointly made by all the members of the family.

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* A. S. No. 91 of 1914. 9th November 1915.

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Appeal against the Decree of the Court of the Temporary Subordinate Judge of Rajahmundry in O. S. No 47 of 1911.

L. A. Govindaraghava Iyer, with *B. Narasimha Rao* for Appellants.

A. Krishnaswami Aiyar and *B. Somayya* for Respondents.

The Court delivered the following

Coutts-Trotter, J.

Judgments :—*Coutts-Trotter, J.* :—My learned brother will give Judgment in this case. I concur in his Judgment and adopt it, and it will stand as the Judgment of the Court.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—The plaintiff, his father Narasayya, Gurumurthi his eldest brother and Venkataratnam the 4th defendant were members of a joint Hindu family. On the 29th of January 1904 while the plaintiff was a minor of the age of 15 or thereabouts the father and the sons (the plaintiff being represented by the father) divided the family properties which consisted of about 6 acres of land and some house sites. There was a deed of partition, Ex. XVII in the case.

In that partition 3½ acres were allotted to the plaintiff while his brother Gurumurthi and Venkataratnam got a little over 1 acre each. The father retained no portion of the ancestral property except two mango trees. A larger share was allotted to the plaintiff on the ground that he was a minor whose Upanayanam and marriage had not been performed. Besides the properties so divided it is stated in the deed that the properties which had been acquired before and any which might be acquired thereafter by the members of the family should belong to them individually. It appears that about 5 acres of land and some house sites were in the possession of the father, which he claimed as his self-acquisition and about 15 acres of land in the possession of Gurumurthi who likewise claimed them as his self-acquisition. They are described in Schs. D and E to the plaint. Narasayya, the father died in April 1905, having before his death made a will bequeathing his properties to his wife, the plaintiff's mother who is the 5th defendant in the suit. Gurumurthi, the eldest brother died in April 1910, and the 1st defendant is his widow and defendants 2 and 3 are his daughters. Plaintiff brought the suit to set aside the partition on the ground that it was fraudulent, his father having been induced to enter into the arrangement by the fraud and undue influence of the 1st defendant's husband Gurumurthi. He also states that the partition was unfair inas-

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much as the properties claimed to be the self-acquisitions of the father and the eldest brother were family properties in which the plaintiff was entitled to a share and that they should not have been excluded from the division. The 4th defendant who was over 20 years of age at the time of the partition supports the plaintiff and challenges the partition as being vitiated by fraud. The mother and 5th defendant as I read her statement though claiming the properties left to her under the will of her husband (which I may mention she has given to the plaintiff himself reserving a life estate to herself) does not traverse the allegations of the plaint as regards the character of the partition. Besides the properties described in Schs. D and E the plaintiff also claimed certain outstandings, movables and immovables described in Schs. F, G and H as part of the family properties in the possession of the 1st defendant, they having been acquired it is said by the 1st defendant's husband either from or with the aid of the family properties, before and after the partition. The trial Judge held that the properties in Schs. D and E have not been proved to be the self-acquisitions of Narasayya and Gurumurthi respectively, that the partition was therefore unfair and was not binding on the plaintiff; he gave the plaintiff a ¼ share in the properties in D and E schedules on the footing that though they were omitted from the division there has been a division in status amongst the members of the family and the plaintiff was therefore entitled to a ¼ share only as a tenant-in-common. He dismissed the plaintiff's suit in respect of his claim to the properties in F, G, and H schedules on the ground that the plaintiff had not proved that they were family properties; on the same ground he also dismissed the suit in respect of J schedule properties they being some vessels and utensils in the possession of the 5th defendant, the mother. The plaintiff has appealed claiming the whole or at least a half share in the properties in Schs. D to J. The 1st defendant has filed a memo of cross-objections disputing the findings of the trial Judge that the partition was unfair and therefore not binding on the plaintiff. Inasmuch as the cross appeal of the 1st defendant goes to the root of the case we have heard it first and the question for determination is whether the plaintiff is entitled to set aside the partition on the ground that it was unfair or prejudicial to his interests. At the outset the question of the burden of

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proof in this case has to be decided, for if the burden was on the plaintiff to show that the partition arrangement was unfair or fraudulent, the plaintiff has wholly failed to establish the same. Both on principle and on authority I think the burden in these cases is on the plaintiff. This is not a case of a guardian entering into a transaction with his ward; nor even the case of a stranger entering into a transaction with the guardian of a minor in respect of the minor's property. Every adult member in a joint Hindu family is entitled to demand partition and can insist on having his share separated and given him and the minor members cannot resist the demand; all that their guardian can do is to protect their interests in the partition; so long then as the minors are represented by their natural guardian the partition is as binding on them as on the adult members, unless any negligence or fraud on the part of the guardian is proved. It is true that a guardian of a minor could not insist on a partition on behalf of a minor unless of course it were proved that that partition or separation was for the benefit of the minor; but that is not this case. Partition amongst the members of the family is a family arrangement and is generally resorted to in order to keep peace in the family or preserve the family properties; and the principles applicable to family settlements are applicable to partitions among the members of a family. There must of course be equal knowledge on the part of the members and there must not be any overreaching or fraud. Even material mistakes do not matter provided that all members have the same knowledge. As observed by Lord Eldon in *Gordon* v. *Gordon* [1], "where family agreements have been fairly entered into, without concealment or imposition upon either side, with no suppression of what is true, or suggestion of what is false, then, although the parties may have greatly misunderstood their situation and mistaken their rights, a court of equity will not disturb the quiet which is the consequence of that agreement." It is for those who seek to set aside a family arrangement to establish the grounds on which they impeach it, *Satyakumar Banerjee* v. *Satya Kripal Banerjee* [2]. In *Nallappa Reddi* v. *Balamma* [3], where also a minor on attaining majority sued to set aside a partition in which he was represented by his mother as guardian, the learned Judges observed as follows:—"In this case the plaintiff and his brothers appear to have been represented in

1. (1819) 3 Swans at 463; 36 E. R. at 917. 2. (1909) 10 C. L. J. 503 at 510.
3. 2 M. H. C. R. 182.

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good faith by their mother and natural guardian and there is nothing to indicate fraud or that any undue advantage was taken of the plaintiff's minority or of the sex of the mother." It appears that the plaintiff's branch in that case obtained only 1 mootta as its share while 4 moottas were allotted to the other branch, and it was contended that the division was unequal on the face of it. Dealing with this contention the learned Judges say "there is no evidence of the relative value of these 5 moottas" and in concluding this portion of the Judgment say "that no such gross irregularity has been shown as will justify us in setting aside the division." Its is obvious that in the view of the learned Judges the burden was on the plaintiff. In *Balakrishna* v. *Ramnaraya* [1] relied upon the Judicial Committee seem to take the same view. They say 'if the partition was unfair on prejudicial to the minor's interests he might on attaining majority by proper proceedings set it aside so far as regards himself." See also *Parvathi* v. *Nanni Lal* [2]. In *Chan Virappa* v. *Danava* [3], Bailey, C. J., seems to take the same view (see p. 603) though Fulton, J., is of the contrary opinion (see p. 604); but the authorities which he cites for that position do not seem to support him and the passage cited from Mayne which is to be found in p. 662 of the 8th edition shows that that learned author was also of the opinion that the burden was on the plaintiff.

In some cases the very nature of the transaction or the method of division may show that it was unfair or prejudicial to the interest of the minor, and in such cases the burden which was on the plaintiff in the first instance may be shifted at once. The burden may also be shifted in cases where the facts are specially in the knowledge of a particular party (see S. 106 of the Evidence Act.)

Assuming however that the burden was on those who set up the partition, as a plea in bar of the plaintiff's claim, to prove that the partition was fair, I have come to the conclusion that the 1st defendant in this case has discharged that burden.

Although allegations of fraud and undue influence were made in the plaint (in fact the whole case for the plaintiff was based on fraud and undue influence) there is no evidence whatsoever in proof of these allegations. But inasmuch as the plaint stated that the properties in schedules D to H were joint family proper-

1. (1903) 30 I. Ap. 139 s. c. I. L. R. 30 C. 738.
2. (1909) I. L. R. 31 A. 412 at 422 (P. C). 3. (1894) I. L. R. 19 B. 593.

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ties, in which the plaintiff was not allotted a share, we have treated the case as one in which the plaintiff seeks to set aside the partition on the ground of its being unfair. In dealing with the evidence it is necessary to remember that the exact question now for determination is not whether the 1st defendant has proved that the properties in the E schedule (she is interested only in them) have been proved to have been acquired by her husband without detriment to or without the aid of family funds, but whether the adult members of the family *bona fide* allowed these properties to the 1st defendant's husband as his self-acquisitions. One important circumstance in favour of the 1st defendant is the fact that the father was himself a party to the partition and represented his minor son the plaintiff in that transaction. No motive whatsoever has been suggested for the father to give up the rights of his infant son in favour of the 1st defendant's husband. The father gained nothing, for if all the plaint properties were family properties, the father for his share would be entitled to more than what he retained as his self-acquisitions. All that the learned pleader for the appellant could suggest was that the father may have been under a *bona fide* misapprehension as to the legal rights of his eldest son in his acquisitions. Even if it were so I do not think the plaintiff would be entitled to set aside the arrangement; however see *Gordon* v. *Gordon* [1], and *Roberts* v. *Roberts* [2]. There is, however, no basis for the suggestion and I see no reason to doubt the truth of the statement by the father that the properties in the possession of Gurumurthi were his self-acquisitions. The plaintiff if he had chosen could have called the 4th defendant, the only adult member now alive who was a party to the partition and who according to the Judge forced the partition on the family, to explain the statements in the partition deed. It is equally a matter for observation that the plaintiff has not called his own mother who is and has been living with him and who must have known of the circumstances which led to the partition and the disruption of the family.

The partition arrangement has further been acted upon by the members of the family up to the date of the institution of the present suit. The 5th defendant the mother who took under the will of her husband has, as I have already observed, settled the

1. (1819) 3 Swan. 400 at 463. 2. (1905) 1 Ch. p. 704.

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property on the plaintiff himself (Ex. W.). Though the settlement was in form a sale for Rs. 1,000, there seems to be no reason to doubt the genuineness of the transaction *i.e.*, that the mother did *bona fide* intend to transfer the property to the plaintiff, her youngest son. Here again the plaintiff who was then living with his mother has not chosen to give evidence as to whether he was aware of this transaction; and the mother too has not been called to give evidence as to the circumstances in which she executed the document. It is said that the plaintiff was a minor at the time but if he was over 15 in January 1904, the date of the partition deed he certainly was of age when Ex. U was executed; I cannot help thinking that the plaintiff had full knowledge of the gift in his favour which he must have accepted; though on the death of the 1st defendant's husband which took place long after this transaction he has chosen to repudiate that also, to set up a claim to all the properties as joint family properties.

The positive evidence let in on behalf of the 1st defendant, though by itself it may not establish that all the items of properties described in the E schedule, were her husband's self-acquisitions, is in my opinion taken with the other circumstances already referred to, quite sufficient to estabtish the *bona fides* of the partition and that the members of the family were perfectly right in allowing the properties then claimed as self-acquisitions to the respective members.

It appears that by a division amongst Narasayya and his brothers which took place before 1869, about six acres of land fell to the share of Narasayya. In 1870 Narasayya borrowed a sum of Rs. 400 by mortgaging the ancestral lands (Ex. VI) and although he was in possession of those lands the debt increased to Rs. 769-6-9 by the year 1876, and the creditor with possession of all the family lands except an acre (Ex. V dated 29th February 1876). Narasayya had a large family to support and he seems to have supported them from the income derived by officiating as a purohit and by cultivating the lands of third persons taken on lease. It is clear that the family property, namely, the one acre of land was hardly enough to maintain the family much less to make any acquisition whatsoever. The family lands were in the possession of the mortgagee till about 1892, when they were redeemed by the payment of Rs. 590. (See

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Exs. 46 and 48) but were leased out by Narasayya himself immediately after (Exs. III and IV). The first of the acquisitions made by Gurumurthi was under Ex. A on the 11th of March 1891 for a sum of Rs. 500. The lands so purchased was already in his possession as lessee. In that amount was included a sum of Rs. 150 due to Gurumurthi himself from the vendor under Ex. 19 dated 25th April 1890. The balance of the purchase-money had to be paid to the creditors of the vendor. Gurumurthi borrowed Rs. 200 on the 6th of May 1891 under Ex. 36, for paying some of the creditors whom he had undertaken to pay (see Exs. 35 and 37). The sum which he borrowed under Ex. 36 was repaid by borrowing under Ex. 11 on the 16th of February 1892. This document is important as Gurumurthi mortgaged the lands acquired by him under Ex. A as security for the loan; he states that these properties were his self-acquisitions. It is important to note that Gurumurthi had just attained majority and the father Narasayya was about 35 years of age. The fact of Gurumurthi then borrowing monies on his own personal responsibility and acquiring property in his own name seems to me to afford very good evidence of the properties acquired being the self-acquisitions of Gurumurthi. It is in evidence and the learned Subordinate Judge also finds that Gurumurthi and Narasayya were each of them taking lands of others on lease and makes a profit by cultivating them themselves. The learned Judge assumed that such cultivation was on behalf of the family. I do not find any evidence of that. There is no presumption that the earnings of one member of a family belonged to the family in the absence of any evidence that it was thrown into the common stock or that earnings were jointly made by the members of the family. Gurumurthi was borrowing from third parties year by year from 1893 to 1902 making himself personally liable, Ex. 54 series and 42. During this period it is remarkable that the father himself was dealing with the family lands. Exs. III, IV, XL, etc., while Gurumurthi was dealing with the land purchased by him as his own, Exs. XI, XLV, LII and IX. Lands taken on lease by the father in one year were in the subsequent year taken on lease by Gurumurthi, Ex. G and VIII; and no explanation is given as to why there should be this change if all leases were taken on behalf of the family. Again when money was borrowed for a family purpose, the document was executed by the father

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alone, (see Ex. R) though apparently the money was received by both Narasayya and Gurumurthi (Ex. Q.) The evidence alone set out *prima facie* at least shows that item i of the E schedule and probably the other properties as well were the self-acquisitions of Gurumurthi. It is in evidence that item i yielded enough of income to make it possible for Gurumurthi to purchase the other lands described in Sch. E even apart from the profit which Gurumurthi presumably made by cultivating lands taken on lease from others It is unnecessary to deal in detail with the properties described in D schedule. The plaintiff's 4th witness who was the Munsif of the village where the parties lived, and an attestor of Ex. XVII, states in his cross-examination that Narasayya, the father had self-acquired lands though he did not know the extent thereof. I think it clear looking into the circumstances of the family, that properties acquired by the father must have been acquired from his earnings. Whether he treated them as joint family properties is a different question ; but there is no evidence that he did so treat them.

The trial Judge if I understand him right seems to have come to the conclusion that the properties acquired by Gurumurthi were acquired from his earnings from cultivation or moneys borrowed ; but that they should be treated as family properties, because Gurumurthi was the manager or joint manager of the family and in taking leases and borrowing monies he must be assumed to have been on behalf of the family. There is, however, no reliable evidence of this. I have already shown that when the defendant's husband began to make acquisitions he had just attained majority and his father was about 35. That Gurumurthi was assisting his father may be true. But from that to conclude that he was a manager or part manager seems to me to be wholly unwarranted. There is in fact no single transaction dealing with the admitted joint property in which Gurumurthi ever joined and there is no single transaction dealing with the property acquired by Gurumurthi in which the father joined. There are, however, two documents to which reference was made. There are Exs. T and H. Ex. T is an agreement for sale of a house site in favour of Gurumurthi and H is a sale-deed of the same site to Narasayya a month later. From this we are asked to infer that whether the properties were acquired by the father or the son, whether they

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were in the name of the one or the other, they were all treated as joint family property. In the face of the evidence already referred to, the above transaction is wholly insufficient to warrant any such conclusion. Ex. H the sale-deed does not refer to the previous agreement T and the site purchased under H is one of the properties claimed by the father as his self-acquisition. It is true that the sum of Rs. 8 paid by the son was credited to the father, but that is inconclusive. I must finally notice an observation of the trial Judge that the partition was a secret one. There was no doubt at least in the minds of the persons who were most competent to judge as to what the family properties were. The father insisted and obtained an extra share for his youngest child to provide for his Upanayanam and marriage. The deed of partition is largely attested by the residents of the village and I do not see where the secrecy comes in. It is remarkable that the same learned Judge who held that the properties in Schs. D and E were family properties arrived at the conclusion that the properties described in Schs. F to H and J were not proved to be family properties. I have therefore come to the conclusion that the partition of 1904 has been proved to be a fair one and that the plaintiff has no reason to complain of either inequality in the division or that any properties belonging to the family had been omitted from the division.

I think the plaintiff's suit fails and must be dismissed with costs throughout. The appeal will therefore be dismissed but without costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sir John Wallis and Mr. Justice Srinivasa Aiyangar.

A. V. Subramania Aiyar ... *Petitioner** (*Defendant*)

v.

Sellammal ... *Respondent* (*Plaintiff.*)

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C. P. C. of 1908—S. 110 *Cl.* 1 *and* 2—*Scope and applicability—Privy Council—Leave to Appeal—Grant of—Subject matter of suit in Court of First Instance less than Rs.* 10,000—*Subject matter in appeal more than Rs.* 10,000 *if mesne profits accrued due subsequent to suit and before application for certificate for leave are taken into account—Leave if can be granted.*

Where the value of the subject matter was less than Rs. 10,000 in the Court of First Instance but the value of the subject matter on appeal to the Privy Council exceeded that sum owing to the accrual of mesne profits during the

* C. M. P. No. 1682 of 1915. 7th September 1915.

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period between the institution of the suit and the petition for a certificate, held that the appellants had not brought themselves within S. 110 of the Code and that leave to appeal to the Privy Council could not be granted.

Moti Chand v. *Ganga Prasad* [1] applied.

Scope and applicability of clauses 1 and 2 of S. 110 considered.

Per *Srinivasa Iyengar, J*:—The words "the subject matter of the suit in the Court of First Instance" in clause 1 of S. 110 do not include mesne profits subsequent to the suit.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to grant leave to appeal to His Majesty in Council from the decree of the High Court in A. S. No. 284 of 1912, preferred against the decree of the Court of the Subordinate Judge of Madura in O. S. No. 93 of 1910.

T. R. Ramachandra Aiyar and *G. S. Ramachandra Aiyar* for the Petitioner.

R. Kuppuswami Aiyar for the Respondent.

The Court delivered the following

The Chief Justice.

Judgment:—*The Chief Justice.*—In this case the amount or value of the subject matter of the suit in the Court of First Instance was less than Rs. 10,000 but the amount or value of the subject matter in dispute on appeal to His Majesty in Council exceeds that sum owing to the claim for mesne profits for the period between the institution of the suit and the petition for a certificate. It is clear that the case does not satisfy the provisions of the first paragraph of S. 110 C. P. C. but we are asked to grant the certificate on the ground that in the circumstances the decree of the High Court involves "directly or indirectly some claim or question to or respecting property of like amount or value" within the meaning of the second paragraph. If this contention be accepted, a certificate must be granted in any case in which the amount or value of the subject matter in dispute on appeal to His Majesty in Council is not less than Rs. 10,000, whether or not the amount or value of the subject matter of the suit in the Court of First Instance fell below Rs. 10,000, and this provision becomes wholly nugatory. In a case where the value of the subject matter was less than Rs. 10,000, in the Court of First Instance but the value of the subject matter on appeal to the Privy Council exceeded that sum owing to the accrual of interest in the meantime their Lordships held that the appellants had not brought themselves within the sec-

1. (1901) L. R. 29 I. A. 40.

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tion. *Moti Chand* v. *Ganga Pershad Chand, Moti Chand ex parte* [1] and I do not think it can make any difference whether the original deficiency in value is subsequently made up by the accrual of interest, or by a claim for mesne profits for the intervening period, or by costs. The decision in *Dalgleish* v. *Damodar Narain Chowdry* [2], proceeded on the authority of *Mohideen Hadagain* v. *Pitchey* [3], a case under the Ceylon Ordinance No. 1 of 1889 which does not impose any condition as to the amount or value of the subject matter of the suit in the Court of First Instance. This condition was first imposed in India by the Privy Council Appeals Act of 1874 (Act VI of 1874). The order of 10th April 1838 had prescribed that the amount or value of the subject matter in dispute in appeal to His Majesty in Council must be Rs. 10,000 or upwards. The alternative which now forms the second paragraph of S. 110 C. P. C. was introduced in clause 39 of the Letters Patent which contained a proviso "that the sum or matter at issue is of the amount or value of not less than Rs. 10,000 or that such judgment, decree or order shall involve directly or indirectly some claim, demand, or question to or respecting property amounting to or of the value of not less than Rs. 10,000." So far the amount or value of the subject matter of the suit in the Court of First Instance did not in any way affect the right of appeal, but it is clear to my mind that in 1874 the legislature intended to alter this and by the new provision inserted *in the section to impose* an additional restriction with reference to the amount or value of the suit when filed. It is, of course, necessary to read the whole section together and to give effect to every part of it, and when doing so it becomes necessary in my opinion, in order to give effect to the new provision in the first paragraph to put a restrictive construction on the general words of the second paragraph which are reproduced from S. 39 of the Letters Patent and to read them in their present collocation as applying only to cases which involve some claim or question to or respecting property additional to the actual subject-matter in dispute in the appeal and to be taken into account therewith in making up the appealable value. Something might be said for this construction of the alternative provision as it stood in clause 39 of the Letters Patent and I

1. (1901) L. R. 29 I. A. 40. 2. (1906) I. L. R. 33 C. 1286.
3. (1893) A. C. 193.

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think that it is imperatively required in the present S. 110 C. P. C. which first appeared as S. 5 of the Act of 1874, if the provision in the earlier part of the section is not to be rendered nugatory. Some difficulty is no doubt occasioned by the retention in the second paragraph of the words "involve directly." But I think my learned brother in his judgment which I have had the advantage of reading has shown how effect may be given to the word directly consistently with this construction; and in any case I think that in the section as it now stands the words, "involve directly," cannot be read as including cases which involve nothing but the actual subject matter in dispute in the appeal. Cases which involve nothing else are in my opinion governed exclusively by the first paragraph. The petition is dismissed with costs.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J.—This is an application for leave to appeal to His Majesty in Council. The original suit was to recover possession of a portion of a house with mesne profits from the defendant. Though the plaintiff claims the whole house he does not sue for the remaining portion as he is in possession of it. It is, however, admitted that the market value of the whole house together with the amount claimed for mesne profits up to the date of the institution of the suit is much less than ten thousand rupees. It is stated that the value of the whole house together with mesne profits as claimed by the plaintiff up to the date of the decree in appeal would amount to over ten thousand rupees. Two points are taken for the petitioner, first that the value of the subject matter of the suit in the Court of First Instance should be taken to be above ten thousand rupees, second that whether the subject matter of the suit in the Court of the First Instance was above ten thousand rupees or not, the final decree of this Court involves a claim to property of over ten thousand rupees in value. As regards the first point, petitioner contends that the subject matter of the suit in the Court of First Instance includes mesne profits subsequent to the date of the suit. If this contention is right, mesne profits subsequent to the date of the institution of the suit up to the date of the final determination by the Judicial Committee, or even beyond, till the delivery of possession of the property, or 3 years after the date of the final decree, whichever event first occurs, could be the subject matter of the suit, and its value would vary with the length of time during

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which the suit may be pending in the Courts. This construction renders the enactment of this portion of the clause perfectly useless; for there can be no case in which the matter in dispute on appeal to his Majesty in Council would be of the appealable value in which the subject-matter of the suit would not at least be of the same value. Prior to Act VI of 1874, it was well settled that interest on money claims and mesne profits of immovable property subsequent to the date of the institution of the suit actually awarded by the decree appealed against may be added in computing the value of the matter in dispute in appeal to His Majesty in Council, but not interest accruing subsequent to the decree, and if that amount was Rs. 10,000 or over, a party was entitled to appeal, though the value of the subject-matter of the suit in the Court of First Instance was less. *Gooroopershad Khoond* v. *Juggat Chunder* [1], *Doorga Doss Chowdry* v. *Ramanath Chowdry* [2], *Goordoss Roy* v. *Gholam Mowlah* [3], see also *Bank of New South Wales* v. *Owston* [4]. Act VI of 1874 for the first time enacted that the value of the subject matter of the suit in the Court of First Instance should also be ten thousand rupees or upwards and imposed an additional restriction on the right of appeal. I think except in British India and Straits Settlements no such restriction is to be found in the laws of the other colonies or British possessions. In *Motichand* v. *Ganga Parshad Singh* [5], the Judicial Committee expressly decided that when the amount claimed in the suit was less than ten thousand rupees, no appeal lay to His Majesty in Council, though the amount of the matter in dispute in appeal by the addition of interest subsequent to the institution of the suit came to ten thousand rupees or upwards. This decision is conclusive on the question, and I am unable to draw any distinction between interest and mesne profits in this respect. The petitioner relied on *Dalgleish* v. *Damodar Narain Choudry* [6] and *Basanta Kumar Roy* v. *Secretary of State for India* [7] in support of his contention. In the first of the above cases it seems to have been assumed that future mesne profits formed part of the subject-matter of the suit, and reliance was placed on the Judgment of the Judicial Committee in *Mohideen Hadgian* v. *Pitchey* [8]. That

1. (1860) 8 M. I. A. 166 at 168.
2. (1860) 8 M. I. A. 262 at 264.
3. (1862) Marshall's reports, p. 24.
4. (1879) 4 App. Cas. 270, at 274.
5. (1901) L. R. 29 I.A. 40=24 A. 174.
6. (1906) I. L. R. 33 C. 1286.
7. (1910) 6 I. C. 792.
8. (1893) L. R. A. C. 193.

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was a case from Ceylon and attention of the learned Judges of the Calcutta High Court was apparently not drawn to the provisions of the Ceylon Ordinance, which contains no clause similar to the first portion of Clause I of S. 110 of the Code of Civil Procedure. Though the case of *Motichand* v. *Ganga Prashad Singh* [1], was cited in the argument there is no reference to it in the Judgment. In the second case it is said that "as the Court could provide in the decree for the payment of mesne profits from the institution of the suit, until the delivery of possession or until the expiration of 3 years from the date of the decree, such mesne profits can legitimately be regarded as part of the subject matter of the suit." So also can the Court award interest from the date of the institution of the suit up to the date of payment or realisation. There is no reference in the judgment to the case in *Motichand* v. *Ganga Prashad Singh* [1]. In the case of future mesne profits, the cause of action, it must be remembered, does not accrue even at the date of the institution of the suit. With the greatest respect to the learned Judges I am unable to follow these decisions. I therefore disallow the 1st contention. As to the second point, petitioner contends that inasmuch as the decree of this Court directs him to surrender possession of the house and pay mesne profits, the decree necessarily involved a claim to property of over the appealable value. This construction renders the whole of the 1st clause nugatory. It must be remembered that provisions similar to these are to be found in the laws of a large majority of the colonies, (see the table in Burge's Colonial Laws Vol. I 362 *et. seq*) and it is impossible to construe the second clause of S. 110 of the Code of Civil Procedure so as to render the first perfectly useless. If the second clause stood by itself (see Wheeler's Privy Council Practice p. 694) it would be legitmate to construe it in the manner suggested, as the word "involves" is sufficiently wide to cover direct adjudications in respect of the subject-matter in dispute. In this case we have to take both the clauses together so as to give a meaning to both. In my judgment, the first clause applies to cases where the decree awards a particular sum, or property of of a particular value, or refuses that relief, (*i. e.*), to cases where the object-matter in dispute is of a particular value. In fact, the words 'objects in dispute' are used in the provisions relating to

1. (1901) L. R. 29 I. A. 40,

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appeals from Guernsey. If the operation of the decision is confined only to the particular object-matter, Clause 2 does not apply and unless the case satisfies the conditions in Clause 1, there is no right of appeal. If the decision beyond awarding relief in respect of the particular object-matter of the suit affects rights in other properties, Clause 2 would apply; also if the matter in dispute is one which is incapable of valuation as in the case of easements, Clause 2 may apply. A few illustrations from the decided cases would make the matter plain. In *Sreemutty Ranee Surnomoyee* v. *Maharajah Sutteshchunder Roy* [1] the plaintiff sued to establish his right to enhance the rent of a holding in the possession of the defendant, which the defendant claimed to hold at a fixed rent of Rs. 65. The plaintiff obtained a decree establishing his right to enhance the rent to Rs. 800 or thereabouts. The question was raised whether the value of the subject-matter in appeal to the Privy Council was the capitalised value of this Rs. 800 which would be the amount by which the value of the defendant's estate would be diminished. Their Lordships found it difficult to bring the case within the words of the Order in Council of April 10, 1838, but gave special leave to appeal on the ground that the decision involved a claim to property of more than ten thousand rupees in value. I may draw attention to the fact that this decision was given in the year 1860 and the present second clause was introduced into the Letters Patent in the year 1862.

In *Amar Chandra Kundu* v. *Shoshi Bhushan Roy* [2] the plaintiff, a tenant-in-common, sued for a mandatory injunction directing the defendant, another tenant-in-common, to demolish buildings erected by him on a plot of common land. The subject-matter of the suit was for purposes of Court fees valued at Rs. 1,500. The plaintiff obtained a decree in the High Court, the result of which was to oblige the defendant to remove buildings worth more than ten thousand rupees. Leave to appeal to the Privy Council was applied for and granted. In a similar case in Madras, *Sreemuth Devasikamoney Pandarasannadhi* v. *Palaniappa Chettiar* [3], the plaintiff obtained in the High Court a decree for possession of a piece of land worth at the most Rs. 2,000; the defendant had built on the land and the buildings were valued at over

1 (1860) 8 M. I. A., 165. 2. (1903) I. L. R. 31 C. 305.
3. (1910) I. L.R 34 M. 535, 20 M. L. J. 970.

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Rs. 20,000, and he had to remove them. Leave to appeal to the Privy Council was applied for by the defendant and granted.

In *Mutusawmy Jagavera Yettapa Naikar* v. *Vencataswara Yettia* [1] a decree was passed by the Civil Court of Tinnevelly, in appeal awarding Rs. 2,500 a year for maintenance, that being the highest sum which the First Court had jurisdiction to give and this decree was confirmed by the High Court. An application for special leave was made to Her Majesty in Council. In discussing the question whether the application should not have been made to the High Court first, their Lordships came to the conclusion that it could not have been made there on the ground that the matter in dispute was below Rs. 10,000. It must, however, be noted that the facts of that case were peculiar.

In *Sauvageau* v. *Gauthier* [2] A, who had obtained an assignment of certain choses-in-action from B sued one of the debtors, C, to recover the debt due to him. The assignor had become an insolvent and his assignee in bankruptcy intervened in the suit and claimed the sum as against A, the private assignee, contending that the assignment was void as against him. His contention was disallowed and he applied for leave to appeal to the Privy Council. The Privy Council declined to give leave; but they say this, that if he had instituted a suit against the private assignee for a declaration that that assignment was bad, the subject-matter of the suit would have been over the appealable value, but inasmuch as his claim was limited to only one of the debts, he was not entitled to leave; they declined to grant special leave on the ground that that decision need not necessarily affect the title to the other debts.

In *Ajuas Koer* v. *Mussammut Luteefa* [3] where the suit was to establish the plaintiff's rights to take water from a channel to irrigate his land, Markby, J., held that the value of the subject-matter in dispute was the amount by which the value of the land would be diminished if the right to take the water was not granted. The learned Judge drew a distinction between the value of the relief and 'the value of the subject-matter.'

In *Macfarlane* v. *Leclaire* [4] the plaintiff sued for a sum of money being the debt due to him from X. He applied for attachment before judgment and attached certain properties in

1. (1865) 10 M. I. A. 313.
2. (1874) L. R., 5 P. C., 494, 498.
3. (1872) 18 W. R. 21.
4. (1862) 15 Moo. P. C. C. 181.

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the hands of Y on the ground that Y was holding those properties on behalf of X. Y claimed the properties as his own under a conveyance from one P, who himself obtained the properties from X. Plaintiff replied that the conveyance from X to P and from P to Y were fraudulent as against the creditors of X. The Plaintiff succeeded. The amount of debt due to him for which he obtained a decree was less than the appealable value, but as the adjudication was also that the purchase by Y was not valid as against the creditors of X, the decision involved a question of title to the property of over the appealable value. The Privy Council, in the absence of a clause like the second clause, were obliged to bring it within the words "matters in dispute in appeal to the Privy Council."

The above cases, except the cases reported in *Amar Chundra Kundu* v. *Shoshi Bhushan Roy*. [1] and *Sreemuth Devasikamoney Pandarasannadhi* v. *Palaniappa Chettiar*, [2] were decided when the Order in council, dated 10th April 1838, or provisions similar thereto were in force. They afford instances of cases in which the subject-matter of the suit was incapable of a real or accurate valuation, or where the value of the subject-matter of the suit was below the appealable value but the decision directly involved a claim or question respecting property of over-ten thousand rupees in value. Even if the words "subject matter of the suit" or "matter in dispute in appeal" do not mean the object-matter, but connote the jural relationship between the parties [See *Ramaswami Ayyar* v. *Vythinatha Ayyar* [3], also *Kaveri Ammal* v. *Sastri Ramaier* [4],] the present case would clearly come within the first clause and the second clause would have no application whatsoever. In some cases it may be difficult to determine under which clause a particular case falls [See *Ram Kripal Shukul* v. *Rup Kuar* [5] and *Bhagvat Sahai* v. *Pashupathi nath Bose* [6], but I do not think that this would in any way affect the decision, as I think that in all cases in which the final decision involves a claim or question to property of a particular value, the decision of the First Court also would necessarily involve a claim or question in respect of property of the same value.

1. (1903) I. L. R. 31 Cal. 305.
2. (1910) I. L. R. 34 Mad. 535.
3. (1903) I. L. R. 26 Mad. 760, 763.
4. (1902) I. L. R. 26 Mad., 104, 109.
5. (1881) I. L. R. 3 A. 633.
6. (1906) 3 C. L. J. 257.

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The following cases are instances in which the decision involves *indirectly* a claim or question to or in respect of property of the appealable value. *Baboo Gopal Lall Thakoor* v. *Teluk Chunder Rai* [1], *Ko Khine* v. *Snadden* [2], *Joogulkishore* v. *Jotendro Mohun Tagore* [3], *In the matter of the petition of Khwaja Muhammad Yusuf* [4], *Sri Krishen Lal* v. *Kashmiro* [5]. I am supported in the construction which I have adopted by the decision in *De Silva* v. *De Silva* [6] and a case from the colonies, *Gardiner* v. *Micullock* [7] cited in Wheeler's Privy Council, Practice 604. In *Dalgleish* v. *Damodar Narain Chowdry* [8], already cited, a different view was taken, but no reasons were given for the conclusion. I am unable to follow it. On the other hand in *Motichand* v. *Ganga Prasad Singh* [9] already referred to the Judicial Committee proceed on the assumption that the second clause was inapplicable to cases of this sort. I would, therefore, disallow this contention also.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

Thavasi and others	...	*Appellants* in all (Defendants 1 to 3; 9 to 12)*
v.		
Arumugam and others	...	*Respondents in S.A. No. 2007 of 1913 (Plaintiffs).*
Muthukaruppayee Athal	...	*Respondent in S. A. No. 2008 of 1913 (Plaintiff)*
v.		
Valathal	...	*Respondent in S. A. No. 2009 of 1913 (Plaintiff).*

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C. P. C. Sec. 2, (12)—Mesne profits—Definition of—Damage due to withholding of possession—Right to—Defence that crops if sown could not be harvested at the time of delivery of possession to plaintiff, inadmissible—Specific Relief Act, S. 9—Mesne profits not to be decreed—C. P. C. S. 11 Expl. 5 and O. 2, R. 2—No bar to subsequent suit for mesne profits.

A person wrongfully kept out of possession is entitled to recover not only the profits which the defendant could have made while in possession but also the loss that he (the plaintiff) has sustained by the withholding of possession. It is not a defence therefore, to a claim for the value of the crops that might have been raised on the land that the delivery to the plaintiff was at a time when even if the land

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* S A. Nos. 2007 to 2009 of 1913. 2nd December 1914.

1. (1860) 7 M. I. A. 548.
2. (1868) L. R. 2 P. C. 50.
3. (1882) I. L. R. 8 C 210.
4. (1896) I. L. R. 18 A. 196.
5. (1913) I. L. R. 35 A. 445.
6. (1904) 6 Bom. L. R. 403.
7. (1876) 2 U. L. R. 128 (Law).
8. (1906) I. L. R. 33 C. 1286.
9. (1901) L. R. 29 I. A. 40, s. c. 24 A. 174.

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was sown in due time, the crops would not have been ripe for the defendant to have harvested them.

In a suit under S. 9 of the Specific Relief Act, a decree for mesne profits cannot be made and as such, a subsequent suit for mesne profits will not be barred.

Second Appeals against the decree of the District Court of Ramnad at Madura in Appeal Suits Nos. 15 to 17 of 1910 preferred respectively against the decrees of the Court of the Additional District Munsif of Paramakudi in Original Suits Nos. 14 to 16 of 1909.

C. S. Venkatachariar for the Appellants.

K. V. Krishnaswami Ayyar for the Respondents.

The Court delivered the following

Judgment:—The contesting defendants are the appellants in this Second Appeal. The suit was brought for the recovery of the mesne profits due to the plaintiffs for faslis 1314, 1315 and 1316 during which faslis the defendants were in unlawful possession of the plaintiffs' land. The plaintiffs had brought a former suit (Original Suit No. 131/05) under S. 9 of the Specific Relief Act in January 1905, very soon after they were forcibly dispossessed by the defendants. In that suit, they prayed for possession of the lands with the crops then standing thereon. But if before the decree was passed for possession, the crops were removed by the defendants, the plaintiffs also prayed for recovery of the value of the crops from the defendants.

The District Munsif in that suit decreed only possession of the lands, evidently because the question of the plaintiffs' right to the value of the crops depended upon the plaintiffs' title to the land and in a suit under S. 9 of the Specific Relief Act, the question of title could not be finally decided and need not be gone into. (See the Judgment Ex. IV). The Judgment in O. S. No. 131 of 1905 was passed on the 31st March 1906. The plaintiffs executed that decree and got possession in November, 1906, that is, about the middle of the fasli 1316, after the season for ploughing, sowing and cultivation had expired, such season being in August September 1906. If the defendants had given up the land before August 1906 to the plaintiffs, the plaintiffs could have begun cultivation in the due season of August 1906 and there would have been crops almost ripe for harvest in the middle of November 1906, when alone the plaintiffs were able to get possession through Court.

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Such being the facts, several questions of law have been raised and decided in this case. The District Munsif held that because the defendants after the 31st March 1906 (the date of the decree in the Original Suit No. 131 of 1905 for possession), did not cultivate the lands and left them waste, the plaintiffs were not entitled to mesne profits for fasli 1316. He therefore decreed mesne profits only for faslis 1314 and 1315. The learned District Judge thought that the learned District Munsif was wrong in his opinion that the plaintiffs had negligently delayed the execution of their possessory decree beyond August 1906. The District Judge, therefore, allowed the claim for mesne profits for fasli 1316 which had been disallowed by the District Munsif; but the learned Judge disallowed the claim for mesne profits for fasli 1314 *i. e.*, (mesne profits which the defendants wrongfully carried away in January 1905) on the ground that the plaintiffs having claimed such mesne profits in the former summary suit and not having been granted those mesne profits by the decree in that suit, the plaintiff's claim was barred by *res judicata* under S. 11 of the Civil Procedure Code, read with its explanation V. The decree passed by the learned District Judge contained an arithmetical error because, instead of allowing Rs. 160 (at Rs. 80 a year) for the two faslis 1315 and 1316 as mesne profits, a sum of Rs. 390 was mentioned in the decree.

Out of the 11 grounds mentioned in the memorandum of second appeal, the only two arguable contentions are that the plaintiffs are not entitled to the mesne profits for fasli 1316 and that the decree of the Lower Appellate Court was not in accordance with the Judgment as it made the defendants liable for the mesne profits of the value of Rs. 390 instead of Rs. 160. The second contention based upon the clerical or arithmetical error is accepted as valid by the respondent's vakil and it appears further that that error has been corrected by the Lower Appellate Court itself pending this Second Appeal. As, however, there is a memorandum of objections by the plaintiffs contending that the Lower Appellate Court's disallowance of the plaintiffs' claim for mesne profits for fasli 1314 is erroneous and as the whole of the disputed matter is now before us, this Court will draw up a proper decree in accordance with the rights settled by our Judgment in supersession of the Lower Appellate Court's decree. The only remaining contention so far as the Second Appeal is concerned is that relating to the

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mesne profits for fasli 1316. Mr. C. S. Venkatachariar for the appellants argued that because the defendants did not cultivate the lands after the date of the decree in the former suit (31-3-1906) and left the lands waste, they were not bound to pay mesne profits for fasli 1316 though the plaintiffs were unable to raise and obtain any profits in that fasli. It is not alleged that the defendants gave notice to the plaintiffs to take possession of the lands as soon as the decree was passed against the defendants or that the plaintiffs wilfully refused to take possession notwithstanding such notice. S. 2, Cl. (12) of the Civil Procedure Code defines mesne profits as "those profits which the person in wrongful possession of such property actually received, or might with ordinary diligence have received." The defendants' wrongful possession continued till the plaintiffs were put in possession through Court, that is, till the middle of November 1906 and the defendants, if they had used ordinary diligence, could have cultivated the plaint lands in August 1906 and raised profits thereon. It was ingeniously argued that, as on the date of the taking of possession by the plaintiffs, the crops would not have been quite ripe for harvest even if they had been raised, the defendants could not have received any profits and hence they were not liable for mesne profits for fasli 1316. Of course, on a literal interpretation of the words in the definition of mesne profits, the argument is plausible enough; but, in any event, the plaintiffs are entitled to recover the loss which they sustained by the defendants' tortious act in having kept the plaintiffs out of possession and whether compensation for such loss is called "profits" or "damages" they are entitled to be reimbursed that loss. Such damages are, naturally, the profits which the plaintiffs would have got from the lands if the lands had not been wrongfully detained by the defendants in the beginning of the cultivation season in fasli 1316. This second appeal therefore fails except as regards the clerical error already referred to and is dismissed with the respondents' proportionate costs on the sum of Rs. 160.

Coming to the memorandum of objections, the question to be considered is whether the Lower Appellate Court was right in holding that the claim for mesne profits for fasli 1314 was barred by *res judicata*. The true scope of a suit under S. 9 of the Specific Relief Act has been considered in the case in *Sheo Kumar*

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v. *Narain Das* [1] and *Tilak Chandra Dass* v. *Fatik Chandra Dass* [2]. In *Sheo Kumar* v. *Narain Dass* [1] the following observations occur:—"Under the Specific Relief Act, the plaintiff would be entitled to recover possession in any event if he had been dispossessed otherwise than in due process of law, and, therefore, was entitled to a decree in the suit instituted under the Specific Relief Act, whether or not the defendants who had dispossessed him were the true owners. *In a suit however, for mesne profits, other considerations would arise, because, as it appears to us, in a suit to recover mesne profits for the time during which a party has been dispossessed, if it be found that he was only a trespasser, and that the person who dispossessed him was the true owner of the property, in such a case, the Court could not award mesne profits as against the true owner.* Therefore we think that the defence under S. 43 of the Code of Civil Procedure fails". Thus it follows that a claim for mesne profits ought not to be made in a suit for possession under the Specific Relief Act because the plaintiff who was forcibly dispossessed could not obtain a decree for mesne profits if the defendant who dispossessed him forcibly was the true owner of the lands; the question of title could not be directy decided in that suit and a relief which depends upon title (considered apart from possession) cannot be given in such a suit. In *Kuppusamy Aiyar* v. *Venkataramaier*, [3] it was held by a Full Bench of this Court that the words "relief claimed in the plaint" in explanation III to S. 13 of the old Civil Procedure Code (corresponding to explanation V to S. 11 of the New Civil Procedure Code) did not include a relief which though claimed in the plaint, the plaintiff was not entitled to as of right, assuming that the defence fails. Now in the former original suit, the defence did fail, but the plaintiff was not entitled as of right to the relief of the award of mesne profits which he claimed, because, as we said just now, the relief of the award of mesne profits depended upon a decision as to the plaintiffs' title which the Court trying a suit under S. 9 of the Specific Relief Act was not bound to decide. We therefore hold that notwithstanding the wide words of explanation V to S. 11, the plaintiffs are not barred by *res judicata* from claiming in the present suit based on title the relief as to mesne profits for fasli 1314.

1. (1902) I. L. R. 24 A. 501. 2. (1898) I. L. R. 25 C. 803.
3. (1905) 15 M. L. J. 462.

Thavasi v. Arumugam.

Mr. C. S. Venkatachariar further contended that even if the suit is not barred by *res judicata* it is barred by O. 2, R. 2, of the new Civil Procedure Code (corresponding to old S. 43), and he relied upon the Privy Council decision in *Rangayya Gounden* v. *Nanjappa Rao* [1]. There are at least two answers to this contention. In the first place, the plaintiff did not omit to sue in respect of or intentionally relinquish in the former suit his claim for mesne profits for fasli 1314 and hence O. 2, R. 2 does not, in terms, apply. In the second place, even if he had so omitted to sue, the case in *Sheo Kumar* v. *Narain Das* [2] clearly shows that the cause of action for mesne profits in an ordinary suit being different from the cause of action in the former summary suit, O. 2, R. 2, corresponding to S. 43 of the old Civil Procedure Code, has no application. We might further add that O. 2, R. 2 directs only that the whole claim in respect of the *same cause of action* should be included in one and the same suit and it has been recently held by a Full Bench of this Court that the cause of action even for past mesne profits is a different cause of action from the cause of action in the suit in ejectment. (See *Ponnammal* v. *Ramamirtha Iyer* [3]. We therefore allow the memorandum of objections with costs throughout on the amount awarded.

In the result, a decree will be drawn up in the suit awarding Rs. 240 as the mesne profits due to the plaintiffs for the three faslis 1314 to 1316. For similar reasons, similar decrees will be drawn up in the connected suits out of which connected Second Appeals 2008 and 2009 of 1913 have arisen.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

Punugu Subbian ... *Appellant* 2nd (Defendant)*

v.

Nukalapati Rami Reddi and others. *Respondents (Plaintiffs Nos. 2 to 6.)*

Punugu Subbian v. Nukalapati Rami Reddi.

Transfer of Property Act (IV of 1882) S. 65 (c)—Acquisition of equity of redemption by prescription against mortgagor—Non-payment of public charges—Revenue sale—Purchase by acquirer—No fraud—Extinguishment of mortgage.

The duty cast on the mortgagor by S. 65 (c) Transfer of Property Act to pay the public charges is a personal one affecting the person in possession under the

* S. A. No. 211 of 1914. 12th January 1916.

1. (1901) I. L. R. 24 M. 491.
2. (1902) I.L.R. 24 A. 501.
3. (1914) 28 M. L. J. 127.

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contract and is not a covenant which touches or concerns property and as such, a person who has acquired the equity of redemption by prescription against the mortgagor is not under a duty to pay the same. Hence if such person allows property to be sold for arrears of revenue though he purchases it himself, the mortgage right will be extinguished.

Second Appeal against the decree (on remand) of the District Court of Nellore dated 19th November 1913 in Appeal Suit No. 170 of 1911 preferred against the decree of the Court of the District Munsif of Kavali in Original Suit No. 450 of 1910.

The facts are fully stated in the judgment.

A. Krishnasami Aiyar for Appellant.

T. R. Ramachandra Aiyar for Respondents.

The Court delivered the following

Judgment:—Mr. Krishnasami Aiyar argues that no cause of action is disclosed in the plaint. This case has been before the Courts during the last six years and yet this point was not raised hitherto; on that account we examined the pleadings carefully; it appears to us that *prima facie* the contention of the appellant is well founded. This appeal relates only to items 672A and 674B. The facts stated in the plaint are, that the plaintiff obtained a mortgage in respect of these items and other properties from certain persons who may be described as the Vavilla people. He brought a suit (Original Suit No. 108 of 1896) against the mortgagors. The right of the Vavilla people to mortgage the property was disputed by the 12th defendant who claimed title from certain persons who may be called the Sarasvati people. The 12th defendant conveyed his rights to one Nalluri Samiah. Nalluri Samiah was made the 19th defendant. Issues 14 and 15 raised the question as to whether the property belonged to the Vavilla or the Sarasvati people. The judgment of the Munsif is not very clear on this point. In effect he seems to have found in favour of the Vavilla people; he gave a decree to the plaintiff. This was confirmed on appeal by the District Judge. While a Second Appeal to the High Court was pending, the revenue payable to Government on the property fell into arrears; and the 2nd defendant in this suit purchased the property at the revenue auction. The plaintiff now seeks to recover the property. His contention is that the 2nd defendant is a *benamidar* for Nalluri Samiah, the 19th defendant in the first suit, and that, as it was the duty of the said Samiah to have paid the arrears, he must be deemed to have committed a fraud in allowing the property to be sold

and in purchasing it in the name of the 2nd defendant for his own benefit. In effect the contention is that the 2nd defendant is a trustee for the plaintiff. It was contended by Mr. Krishnasami Aiyar that there is no legal evidence on which the finding as to the 2nd defendant being a name lender to Samiah can be sustained. The Munsif refers to oral evidence relating to possession and to other circumstances in support of his finding : the Lower Appellate Court has confirmed that finding : we are unable to say that there is no legal evidence to support it. But granting that the 2nd defendant is a *benamidar* for Nalluri Samiah, it has to be proved that Samiah was under any legal obligation to pay the arrears of revenue due upon the lands. *Prima facie,* as we said before, the finding of the District Munsif in the mortgage suit negatives any subsisting right in the Sarasvati people from whom Samiah derived title at the time of the revenue sale. But as the point has been raised for the first time in this Court, we think it safe to call for a finding on the question.

"Whether at the time of the purchase by the 2nd defendant at the revenue sale, the 19th defendant or the Sarasvati people from whom he claimed had such a subsisting interest in the property as made it obligatory on them to pay the revenue for non-payment of which the property was sold?" This question does not refer to the initial liability to pay the revenue by virtue of the patta standing in the name of any of the parties, but to the question whether as between the plaintiff, the Vavilla people and the Sarasvati people *inter se* who was bound to protect the property from the revenue sale.

Both parties may adduce fresh evidence. The finding should be submitted within two months and seven days will be allowed for filing objections.

[In compliance with the order contained in the above judgment, the District Judge of Nellore submitted the following

FINDING:—* * * * The plaintiff as I have said wanted to show that the mortgage in his favour was prior to the sale to Saraswati people. He urges that all that the Saraswati people got was the equity of redemption and Nalluri Samiah stands in their shoes and under S. 90 of the Indian Trusts Act, he was bound to pay the assessment. I think the plaintiff has not proved the facts on which he relies. Even if he had

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proved them, it would not advance his case, for *Srinivasachari* v. *Gnanaprakasa Mudaliar* [1], is an authority for the position that there is no obligation on the purchaser of the equity of redemption to pay the public charges accruing due in respect of what he has purchased. It has been argued that the circumstances of that case were different, but the principle is the same and the case seems to me quite applicable. It is further argued that if that be the law, it was unnecessary to remand this appeal but that argument here is for obvious reasons futile.

How the Sarasvati people originally came by the land seems to me still doubtful but it is perfectly clear that they were in possession and from them Bandepalli Venkatachelam got the land and from him Nalluri Samiah. It may be taken they were trespassers.

My finding on the issue sent down to me is that at the time of the purchase by the 2nd defendant at the revenue sale the 19th defandant or the Sarasvati people had no such subsisting interest in the property as made it obligatory on them to pay the revenue for non-payment of which the property was sold.]

A. Krishnaswami Aiyar for Appellant.

T. R. Râmachandra Aiyar for Respondent.

The Court delivered the following

Judgment;—The facts of the case have been fully stated in our order of remand. The finding in effect is that when the land was sold for arrears of revenue, the 19th defendant, who claimed to hold under the Saraswati people, was in possession. The District Judge further finds that the Saraswati people and those who derived title through them were trespassers. It is clear from the documents to which Mr. Ramachandrâ Aiyar has drawn our attention that the possession of the Saraswati people commenced in or about 1882. Consequently at the time of the revenue sale in 1906, the 19th defendant had acquired title to the property by prescription. This title could not affect the right of the plaintiff who obtained his mortgage from the true owners, the Vavilla people, in 1884. As was pointed out in the recent Full Bench decision of this Court in *Vyapuri* v. *Sonamma Boi Ammani* [2], a person holding a simple mortgage is not deprived of his right to bring the mortgaged property to sale because as against the mortgagor a trespasser has been in possession over the statutory period. The point was not considered in the Full Bench ruling whe-

1. (1906) I. L. R. 30 M. 67. 2. (1915) 29 M. L. J. 645.

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ther the trespasser is not entitled to stand in the shoes of the mortgagor, although the rights of the mortgagee remained unaffected. We are of opinion that the trespasser acquired by prescription the rights of the mortgagor. The 19th defendant by tacking on the possession of the Saraswati people, acquired by adverse possession the equity of redemption in the property mortgaged to the plaintiff. The limited right in that equity which the mortgagor possessed passed to the trespasser. On these facts Mr. Ramachandra Aiyar contended that the conduct of the 19th defendant in allowing the property to be sold for arrears of revenue and purchasing it in the name of the 2nd defendant was fraudulent and that the plaintiff was entitled to recover it. *Nawab Sidhee Nuzur Ally Khan* v. *Rajah Ojoodhyaram Khan*, [1] was relied on for this position. The argument of the learned vakil presupposes that the 19th defendant was under a duty to pay the public charges under S. 65 clause (c). The first question therefore is whether the duty cast on the mortgagor passes to the acquirer of the equity of redemption by prescription. The point is not free from difficulty and is not covered by authority in this country. Mr. Krishnaswami Aiyar quoted *Srinivasachari* v. *Gnanaprakasa Mudaliar*. [2] It was held in that case that even a purchaser of the equity of redemption will not be affected by the equities created in favour of the mortgagees. Sadasiva Aiyar and Napier, JJ., in *Ramakrishnama Chetty* v. *Vuvvati Chengu Aiyar* [3], on the other hand point out that a provision in a statute which imposes a liability on a person binds his legal representatives and assigns also.

The authorities in England (see the cases cited in I Smith's Leading Cases pp. 75 to 77) lay down that unless the assignee is named, in most cases, the covenant will not affect him. If we had to decide whether an assignee for value is affected by the covenant mentioned in S. 65 clause (c), we would have referred the matter to a Full Bench. But the case of a person acquiring title not *from* but *against* the owner stands on a different footing.

The covenant created by the clause is in the nature of a personal covenant. Where a benefit is secured or a duty is cast on a personal though it be by virtue of being in possession of real property, the covenant is said to be personal. Shepp. Touchstone 161. In *Dewar* v. *Goodman*, [4] the House of Lords laid down that " a

1. (1866) 10 M. I. A. 540
2. (1906) I. L. R. 30 M 67.
3. (1914) 27 M. L. J. 494.
4. (1909) L. R. 1 A.C. 72.

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covenant to do an act not in respect of the demised premises but which will protect from forfeiture the estate of the lessee in the demised premises is not a covenant which runs with the land." Lord Loreburn points out that such a covenant "does not touch and concern the estate" simply because the estate may come to an end, if the covenant is broken. By parity of reasoning the duty cast on the mortgagor to pay the taxes, although its non-payment may result in the estate being sold for arrears of revenue is not a covenant which touches or concerns the property and as such runs with the land. It is a personal covenant affecting the person in possession under the contract.

The decision in *In re Nisbet and Potts Contract* [1], at first sight lends colour to the suggestion that a person coming into possession by virtue of prescription is bound by similar covenants. That was a case of a negative covenant. The Court of Appeal considered that such a covenant was in the nature of a negative easement and that consequently it affected squatters on the land whether they acquired title to it or not. Collins, M. R. says, "It was admitted that a squatter could not take land freed from an affirmative legal easement; and I understand it to be admitted also that if the right arising out of the restrictive covenant entered into by the former owner of the land was such as Sir George Jessel, M. R. considered it, namely, analogous to a negative easement, then the squatter would take the land subject to the paramount right created by the obligation imposed by the covenant which adhered to the land, and the burden of that covenant would pass to those persons who might become assignees of the land or might acquire in any way a title to the land." This decision is no authority for holding that a person holding property adversely is bound by all the obligations which rested upon the owner in respect of the property. On the other hand, it was pointed out by Lord Esher in *Tichborne* v. *Weir* [2] that the title of the true owner is not transferred to the adverse owner. "The Statute does not convey but destroys the right." Bowen, L. J., quoting Dart's Vendors and Purchasers, was of opinion that the acquirer can in no sense be said to stand in the shoes of the original owner. The point decided in the case was that a covenant to repair did not bind the person who acquired title by prescription. *Brassington* v. *Llewellyn* [3] is to the same effect. See also Banning on

1. (1906) L. R. 1 Ch. 386. 2. (1892) 67 L. T. 735.
3. (1858) 27 L. J. Exch. 297

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Limitation page 84. It is true that the decisions above quoted were given with reference to leases. We see no reason why the same principle should not apply to mortgages. We must therefore hold that the 19th defendant by virtue of having acquired the equity of redemption in the mortgaged property was not under a duty to pay the taxes under S. 65 Clause (c) of the Transfer of Property Act.

Mr. Ramachandra Aiyar's last contention was that apart from the statutory duty, any person who acquires property by fraud must restore it to the true owner; and he relied on *Nawab Sidhee Nazur Ally Khan* v. *Rajah Ojoodhyaram Khan*, [1] for this extreme position.

It may now be taken as settled that if there is a fiduciary relationship between the parties and one of them has committed a breach of duty, the person injured can compel the person benefitted by the breach to restore the property he has acquired. That is really what was laid down in *Nawab Sidhee Nuzur Ally Khan* v. *Rajah Ojoodhyaram Khan.* [1] We do not agree with Mr. Ramachandra Aiyar that this judgment is authority for the proposition that if any body acquires property by fraud whether there is a fiduciary relationship between the parties or not, the true owner can recover possession. Ss. 88 to 90 of the Trust Act show that the duty of restitution is cast only on persons occupying either a fiduciary position or who have a joint interest with the person defrauded. There is no authority for the broad proposition that no title can be acquired, if fraud has been used in its acquisition. We think the right to claim the benefit of a fraudulent advantage should be restricted to persons who are "under a duty to speak" or under some relationship as above indicated.

We must therefore hold that the plaintiff is not entitled to recover possession from the 2nd defendant.

We must allow the appeal, reverse the decrees of the courts below and dismiss the suit with costs of the 2nd defendant in this Court. Parties will bear their own costs in the Courts below.

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1. (1886) 10 M. I. A. 540.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Coutts Trotter and Mr. Justice Seshagiri Aiyar.

Bikkina Ramayya ... *Appellant* (Plaintiff)*

v.

Adabala Seshayya and others ... *Respondents (Defendants 1 to 6.)*

Bikkina Ramayya v. Adabala Seshayya.

Transfer of Property Act, Ss. 2 (c), 58 *and* 67—*Mortgage by conditional sale—Mortgage before the Transfer of Property Act—Absence of words of conveyance, effect of—Law before the Act, applicability of—Remedies under the Transfer of Property Act, if available—Statute—Interpretation.—Limitation Act, Art.*132, 135.

Where a mortgage document of the year 1879 did not in terms purport to sell the mortgaged property but only contained a covenant by the mortgagor to relinquish all rights in the property as if it had been sold, in case there was default in payment of the mortgage money within the stipulated period, *Held* that the document should be construed with reference to the law as it stood before the Transfer of Property Act and so construed it was a mortgage by conditional sale.

Pattabhiramier v. *Venkatarow Naicken* [1] *Thambusami's case* [2] referred to.

Held further that the remedies given by S. 67 of the Transfer of Property Act could be availed of by the parties to the document and that there was nothing in S. 2 (c) of the Act to disentitle them from so doing.

Suit for foreclosure in respect of such a document is governed by Art. 132 and not by Art. 135 of the Limitation Act.

The right to a relief arising from a certain jural relation existing between parties is a matter of adjective law, and consequently the parties are entitled, when a new remedy has been provided by a new Act at the time when the relation subsists, to take advantage of that remedy in a court of law.

Pergash Koer v. *Mahabir Pershad Narain Singh* [3] *Bholio Sundari Debi* v. *Rakhal Chunder Bose* [4] *Kaveri* v. *Ananthayya* [5] *Mata Din Kasodhan* v. *Karim Husain* [6] relied on. *Srinath Das* v. *Kotter Mohan Singh* [7] distinguished.

Second Appeal against the decree of the District Court of Godaveri at Rajahmundry in A. S. No. 111 of 1913 preferred against the decree of the Court of the Additional District Munsif of Amalapur in O. S. No. 361 of 1912.

P. Narayanamurthi for Appellant.

P. Somasundaram for Respondents.

The Court delivered the following

Judgment:—The first point for consideration in this case is whether Ex. A is a mortgage by conditional sale or a simple mortgage. If we are to apply the tests contained in S. 58 cl. (c) of the Transfer of Property Act, the document cannot be treated

* S. A. No. 123 of 1914. 9th February 1916.

1. (1870) 13 M. I. A. 560.
2. (1875) L. R. 2 I. A. 241.
3. (1885) I. L. R. 11 C. 582.
4. (1886) I. L. R. 12 C. 583.
5. (1886) I. L. R. 10 M. 129.
6. (1891) I. L. R. 13 A. 432.
7. (1889) L. R. 16 I. A. 85.

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as evidencing a mortgage by conditional sale, because it does not purport to sell the mortgaged property. The only condition which provides for passing an absolute right is in these terms: "Therefore in default of payment of any instalment in the aforesaid manner, the said entire mortgaged property shall be relinquished as if I had sold it to you." It is clear that there was no ostensible sale to the mortgagee which was intended to convey an absolute estate after the expiration of the prescribed period. See *Srinivasa Aiyangar* v. *Radhakrishnan Pillai* [1], and *Hakeem Patte Muhamad* v. *Sheik Davood* [2]. But it was contended for the respondents and we think rightly, that this document should be construed with reference to the law as it stood before the Transfer of Property Act. It was held by the Judicial Committee in *Pattabhiramier* v. *Venkatarow Naicken* [3], that a document which was not *ex facie* a sale but only contained a covenant to give up all rights in the property as if it had been sold should be regarded as a mortgage by a conditional sale. This view was reaffirmed by their Lordships in *Thumbusami's case* [4]. At page 248 the definition of a mortgage by conditional sale by Mr. Justice Mcpherson in his book is quoted with approval. According to that definition all that was required was that the borrower should not have made himself personally liable for the payment of the loan, and have covenanted that on default of payment of principal and interest on a certain date the land pledged shall pass to the mortgagee. Applying these tests to the document in question we have come to the conclusion that Ex. A is a mortgage by conditional sale.

The next question is whether the remedy given by the Transfer of Property Act in S. 67 can be availed of by the parties to the document. It was contended that if the document is to be construed according to the canons of construction which prevailed before the Transfer of Property Act was enacted, the relief sought must be the one which was available before the Act came into force. We cannot agree with this contention. The right to a relief arising from a certain relation existing between parties is a matter of adjective law, and consequently the parties are entitled, when a new remedy has been provided by a new Act at the time when the relation subsists, to take advantage of that remedy,

1. (1913) I. L. R. 38 M. 667.
2. (1915) 18 M. L. T. 209.
3. (1870) 13 M. I. A. 560.
4. (1875) L. R. 2 I. A. 241.

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in a Court of Law." This was the view taken by Mitter and Field, JJ. in *Pergash Koer* v. *Mahabir Pershad Narain Singh* [1], and that has been approved by a Full Bench in *Bhobo Sundari Debi* v. *Rakhal Chunder Bose* [2]. Wilson, J. says "It is a general rule in construing statutes that in matters of substantive right they are not to be so read as to take away vested rights, but that in matters of procedure they are general in their operation. I do not think we ought to conclude that the legislature in the Transfer of Property Act meant to depart from the settled principle of legislation, unless that intention is shown beyond reasonable doubt." The other learned Judges expressed the same view. *Kaveri* v. *Ananthayya* [3], and *Mata Din Kasodhan* v. *Kazim Husain* [4], accept this principle as sound. See also *Ganga Sahai* v. *Kishen Sahai* [5]. Our attention was drawn to the decision of the Judicial Committee in *Srinath Das* v. *Khetter Mohan Singh* [6]. That was the case of a mortgage by conditional sale executed in the year 1865. Their Lordships of the Judicial Committee point out that the cause of action under the old law arose in February 1866 when the mortgagor's right to possession was determined, and that when the Act of 1882 came into force that right had become extinguished; and they consequently held that there was nothing in the Transfer of Property S. 2 to revive a right which had become extinct. Reference may also be made to *Khunni Lal* v. *Gobind Krishna Narain* [7], and *Mahomed Mehdi* v. *Sakinabai* [8]. *Srinath Das* v. *Khetter Mohan Singh* [6], is only authority for the position that if when the new Act comes into force the right is not subsisting, the parties cannot avail themselves of the remedy given by the new Act. On the other hand, we have a catena of decisions under the Limitation Act and S. 6 of the General Clauses Act which hold that if the right to sue is subsisting on the date of the new or amending Act, the remedy provided by it is available to the parties. See *Chidambaram Chetty* v. *Karuppan Chetty* [9], and *Lala Soni Ram* v. *Kanhaiya Lal* [10]. It is true that the new Act cannot be applied to take away any vested rights to relief existing under the repealed Act. See *Gopeshwar*

1. (1885) I. L. R. 11 C. 582.
2. (1886) I. L. R. 12 C. 583.
3. (1886) I. L. R. 10 M. 129
4. (1891) I. L. R. 13 A. 432.
5. (1884) I. L. R. 6 A. 262.
6. (1889) L.R. 16 I A 85 s.c. I.L.R. 16 C. 693.
7. (1911) L. R. 38 I. A. 87 s.c. I. L. R. 33 A. 356.
8. (1912) I. L. R. 37 B. 393.
9. (1910) I. L. R. 35 M. 675.
10. (1913) L. R. 40 I. A. 74, s. c. I. L. R. 35 A. 227.

Pal v. *Jiban Chandra Chandra* [1]. But that will not be the effect of this case. In the present case although the document is of 1879, the cause of action accrued only in 1881. In very similar circumstances the Madras High Court in *Ammanna* v. *Gurumurthi* [2], came to the conclusion that the remedy given by the Transfer of Property Act could be availed of. Apart from these decisions, we see nothing in S. 2 cl. (c) of the Transfer of Property Act to disentitle the parties from seeking the relief given by the Transfer of Property Act. It is a provision intended to preserve existing rights and not a disabling provision. That section appears to us to have been intended to preserve the earlier remedies if the parties chose to avail themselves of them and not to take away the remedy given under the Act. In the view we have taken, the article of the Limitation Act applicable to this suit is not Art. 135 but Art. 132 read with S. 31 of the Limitation Act and consequently the suit is not barred by limitation. The decision of the courts below must be reversed and the suit remanded for disposal according to law. The costs will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Iyenger.

J. Subba Row ... *Appellant* (Defendant)*.

v.

J. Rama Row ... *Respondent (Plaintiff)*.

Limitation Act Arts. 62 and 120—Receipt of money by manager of Jaghir—Suit for account by person entitled to a share of income—Limitation—Civil Procedure Code O. 2, R. 2—Return of plaint in first suit for presentation to proper Court—No re-presentation—Subsequent suit, if barred.

Art. 62 of the Limitation Act applies only to cases where a definite sum of money had been received by the defendant, which the law says he must hold for the use of the plaintiff. It has no application to a case where the defendant is sought to be made liable not only for what he actually received but also for what he failed to receive owing to his default.

A suit against the defendant who had been appointed manager of a Jaghir with power to collect rents and with a liability to pay over what was due to the plaintiff's share after deducting the legitimate expenses, for an account of the profits received by him but omitted to be paid to the plaintiff, is a suit for account falling within Art. 120 of the Limitation Act.

Muhammad Habibullah Khan v. *Safdar Hussain Khan* [3], followed.

Vydianatha Aiyar v. *Aiyasamy Aiyar* [4], *Mahomed Wahib* v. *Mahomed Ameer* [5], *Segu Chidambaramma* v. *Segu Balayya* [6], distinguished.

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* A. S. No. 148 of 1915. 6th January, 1916.

1. (1914) I. L. R. 41 C. 1125.
2. (1892) I. L. R. 16 M. 64.
3. (1884) I. L. R. 7 A. 25.
4. (1908) I. L. R. 32 M. 191 s c. 19 M. L. J. 94.
5. (1905) I. L. R. 32 C. 527.
6. (1911) 2 M. W. N. 467.

Subba Row. *v.* Rama Row.

O. 2 R. 2 of the Civil Procedure Code is no bar to a subsequent suit if the plaint in the former suit had been returned for presentation to the proper Court and was not re-presented.

Appeal against the preliminary decree passed by the District Court of Bellary in O. S. No. 45 of 1913, on the file of that Court.

The defendant in the suit was the appellant before their Lordships. The appeal arose out of a suit for an account to ascertain the amount due to the plaintiff for his half share of the profits of the Jaghir of Pulamate and Kuttipi for the years 1905, 1906 and 1907 and for the recovery of the amount found due. The defendant's plea was that the suit was barred by the law of limitation and also by the provisions of R. 2, O. 2 of the Code of Civil Procedure 1908.

The facts of the case were briefly as follows:—The plaintiff and the defendant were the descendants of the grantee of the suit Jaghir. In the year 1886 the defendant was appointed as the manager of the plaint Jaghir by the local Government. He was to collect the revenue of the Jaghir, make certain disbursements and pay the plaintiff a half share of the net income at the end of every year. The suit would be barred if the article of Limitation Act applicable to it was Art. 62, while if Art. 120 was the article applicable it would not be. The plaintiff contended that Art. 120 applies to the case; while the defendant urged that Art. 62 applied.

The plaintiff had previously instituted another suit in the Court of the District Munsif of Penukonda for the recovery of his share of the income for the year 1912. It was withdrawn with liberty on the ground that the amount claimed in it was beyond the Munsif's pecuniary jurisidiction. A fresh suit, however, was not instituted. The defendant contended that, by reason of the omission to include the claim for 1912 in the earlier suit, the suit was barred by O. 2, R. 2 of the Code.

The District Judge held that Art. 120 applied to the case and the suit was not barred. With reference to the defence based on O. 2, R. 2 of the Code, he thought that the effect of the withdrawal was to place the parties in the position in which they would have stood had the suit not been instituted at all. He therefore held that O. 2, R. 2, did not operate as a bar.

E. V. R. Sarma for Appellant:—The suit is barred. Art. 62 applies to the case and not Art. 120. The suit is for the recovery of the amount received by the defendant for the plaintiff's use *i. e.*,

for money had and received. The following cases support my contention: *Dulabh Vahuji* v. *Bansidharrai* [1] *Chamanlal* v. *Bapubhai* [2] *Baun Tiwari* v. *Doona Tiwari* [3] *Raoji* v. *Bala* [4] *Mahomed Wahib* v. *Mohomed Ameer* [5] *Vydianatha Iyer* v. *Aiyaswamy Aiyar* [6].

L. A. Govindaraghava Aiyar referred to *Muhammad Habibullah Khan* v. *Sardar Hussain Khan* [7] as a case in point.

That case is no doubt against me but that was distinguished in *Segu Chidambaramma* v. *Segu Balayya* [8].

Abdur Rahim, J.:—A suit for money had and received is a suit in which the amount is definite. In the present case the suit is for an account.

Masihuddin v. *Imtiazunnissa* [9] was a suit for an account and yet Art. 62 was held applicable.

The suit is barred by O. 2, R. 2.

In all the cases referred to by the other side, the defendant was not entitled to collect the amount at all.—See *Vydinatha Aiyar* v. *Aiyasami Aiyar* [6]. In the present case, on the other hand, the defendant was the only person entitled to collect the amount *Muhammad Habibullah Khan* v. *Safdar Hussain Khan* [7] is a case in point and fully supports my contention.

Further in this case the suit is for an account and not for a definite sum. As to the nature of an action for money had and received see 97 Eng. Rep. 676.

The circumstances stated therein are not exhaustive of the cases of an action for money had and received, but they show that in all such cases defendant was not entitled to receive the money claimed by the plaintiff. His receipt was wrongful. See Bullen and Leake on Pleadings pp. 74, 256.

The present case is analogous to the case of a trustee and *cestuique trust*. The suit is for an account and Art. 120 applies. See *Abdul Rahim* v. *Pathummal Bivi*[10] as to the applicability of Art 62.

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1. (1884) I. L. R. 9 B 111. 2. (1897) I. L. R. 22 B. 669 (671).
3. (1896) I. L. R 24 C. 309 (314.) 4. (1890) I L. R. 15 B. 1?5.
5. (1905) I. L. R. 32 C. 527.
6. (1908) I. L. R. 32 M. 191. s. c. 19 M. L. J. 94.
7. (1884) I. L. R. 7 A. 25.
8. (1911) 12 I. C. 705=(1911) 2 M. W. N. 467.
9. (1914) 27 I. C. 533. 10. (1915) 30 M. L. J. 104.

Subba Row v. Rama Row.

The Court delivered the following

Judgments:—*Abdur Rahim, J.*—Two points have been argued before us in this appeal. The first relates to the question of limitation, and the point for decision is whether to this suit Art. 62 of the Limitation Act applies. If it does not, admittedly we have got to refer to Art. 120 of the Act. Art. 62 lays down three years for recovery of money had and received for the plaintiff's use, and the starting point of limitation is when the money is received. That is a well-known form of action, and it applies in cases where a definite sum of money has been received by the defendant and which the law says he must hold for the use of the plaintiff. The present case is a suit against the defendant who is the manager of a Jaghir appointed by the Government, and he is asked to account for money which he received as such manager to the plaintiff who is entitled to a particular share. It is undoubtedly a suit for an account. The defendant was entitled to receive the money and he was bound to pay over what was due to the plaintiff only after the deduction of the legitimate expenses and outgoings. One test which seems to be conclusive is that it could not be said that the money which may be found due to the plaintiff was received at any particular point of time that is put down in Art. 62 as the starting point of limitation. Then it is pointed out by the learned vakil for the respondent that the defendant would be liable not only for what he actually received but also for what he failed to receive from default. That is a case which could not possibly be covered by Art. 62. A number of rulings have been cited to us. Except *Muhammad Habibullah Khan* v. *Safdar Hussain Khan* [1], the other cases seem to be quite distinguishable. For instance, in the rulings reported in *Dulabh Vahuaji* v. *Bansidhar Rai* [2] *and Chamanlal* v. *Bapubhai* [3] there is no discussion whatever of Art. 62 and it does not appear that that article was applied to these cases. *Vaidhyanatha Aiyar* v. *Aiyasami Iyer* [4] and *Mahommad Wahib* v. *Mahommad Ameer* [5] seem to be cases very similar to the Bombay decisions, but none of them relates to suits for an account. The case in *Vaidynatha Iyer* v. *Aiyasami Iyer* [4] was a suit by certain member of a Hindu family which had become

1. (1884) I. L. R. 7 A. 25. 2. (1884) I. L. R. 9 B. 111.
3. (1897) I. L. R. 22 B. 669. 4. (1908) I.L.R. 32 M. 191 s.c. 19 M.L.J. 94.
5. (1905) I. L. R. 32 C. 527.

Subba Row v. Rama Row. — Abdur Rahim, J.

divided and the claim was to recover money received by another member in which the plaintiff was entitled to a share. There was no question of rendering any account and the money in the hands of the defendant belonged to the plaintiff. The defendant had no right to receive the money as the defendant in this case had, and it was a claim for a definite sum which in law belonged to the plaintiff when it was received by the defendant and was therefore held to be received by the defendant for the plaintiff's use. The case reported in *Segu Chidambaramma* v. *Segu Balayya* [1] is also similar to those cases. To the case in *Mahammad Habibullah Khan* v. *Safdar Hussain Khan* [2], Art. 120 was applied. There the person who was jointly entitled with the defendant sued to recover his share of the money in the hands of the defendant after an account being taken of what was received by the defendant, and what he lawfully spent. That was a case very close to the present case and it was held that Art. 62 had no application and the case was governed by Art. 120. In my opinion the present suit is governed by Art. 120 and not Art. 62. The learned pleader for the appellant has also argued that the suit of the plaintiff is barred by virtue of R. 2, O. 2 of the new Civil Procedure Code corresponding to S. 43 of the old Code. What happened was the plaintiff instituted a suit for the profits of the year 1912 in the District Munsif's Court, but afterwards the plaint was returned to him for presentation to the proper court because the valuation exceeded the limits of the pecuniary jurisdiction of the District Munsif and the plaintiff never afterwards re-presented the plaint. It is said that because he had filed a suit for the profits of the year 1912, R. 2, O. 2 applies and his present suit must be held to be barred. But it seems to me that the suit having been practically withdrawn must be treated as if it was never filed and it is impossible to understand how the mere fact that the plaintiff had filed a suit which was afterwards withdrawn should operate as a bar to his present suit. Nothing was adjudicated upon and the suit previously filed does not now exist.

These are the only questions raised in the appeal and in my opinion the judgment of the learned District Judge is right on all the points. The appeal is dismissed with costs.

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1. (1911) 2 M. W. N. 674. 2. (1884) I. L. R. 7 A. 25.

Subba Row v. Rama Row.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J.:—The jural relationship between the plaintiff and the defendant is not disputed. Both of them are beneficially interested and are owners beneficially of a certain Jaghir. But the defendant is the person who constituted the manager. As manager he is entitled to collect the rents and revenue of the Jaghir and bound to account finally for the collections and disbursements. The plaintiff cannot claim a share in each undivided collection nor can he claim any particular sum at the time of collection from the defendant. All that he is entitled to is an account technically so called. Whether that account is to be rendered once a year or when demanded makes no difference. On taking the accounts, it may be found that no money is due from the plaintiff to the defendant. The plaintiff is not entitled to a particular sum from the defendant at the moment he has received it. The article of limitation governing the suit is not therefore 62. There is no other article suggested and the suit must fall within Art. 120. The case in *Muhammad Habibullah Khan* v. *Safdar Husain Khan* [1] seems to be precisely in point and I follow it though I am not willing to adopt the language "resulting trust" as expressing the jural relationship between the plaintiff and the defendant. Other cases, as pointed out by my learned brother, are clearly distinguishable from this case. In all these cases it will be found that the plaintiff was entitled from the very moment the money was received to a particular share of that sum. On the other question, I have nothing to add.

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1. (1884) I. L. R. 7 A. 25.

Chinnu Pillai v. Venkatasamy Chettiar.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Coutts Trotter and Mr. Justice Srinivasa Aiyangar.

Chinnu Pillai and others ... *Appellants* * (*2nd Defendant's Legal Representative*)

v.

Venkatasamy Chettiar and others ... *Respondents* (*Plaintiffs and 1st Defendant.*)

Mortgage—Prior mortgagee—Suit by, without impleading puisne mortgagee—Purchaser under the decree—Rights and liabilities of, or against a puisne mortgagee, suing subsequently on his mortgage—The right of the latter not merely to redeem the prior purchaser but extends to selling the property subject to prior mortgage—Lis pendens.

Where a prior mortgagee brings a suit on his mortgage without impleading the puisne mortgagee and purchases the property in execution of his decree; and the puisne mortgagee subsequently sues for sale on his mortgage against the prior mortgagee purchaser, the puisne mortgagee is entitled to a decree for sale of the property subject to the prior mortgage or if the prior mortgagee purchaser consents to a sale of the property free of incumbrances, the amount of each incumbrance to be paid in the order of the incumbrances. The puisne mortgagee is not bound to redeem before bringing the property to sale.

Mulla Vittil Seethee v. *Achuthan Nair* [1] followed.

Venkatagiri v. *Sadagopachariar* [2] *Venkatanarasammah* v. *Ramiah* [3] *Ramayya Chettiar* v. *Parthasarathi Naicker* [4] dissented from.

Per. *Srinivasa Aiyangar, J.* The rights of prior and puisne mortgagees and the purchasers in defectively framed suits discussed. The cases on the question reviewed.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in O. S. No. 81 of 1913.

The facts are fully stated in the Judgment of Srinivasa Aiyangar, J.

T. M. Krishnaswami Aiyar for the Appellant.

C. V. Ananthakrishna Aiyar and *K. B. Ranganatha Aiyar* for the Respondents.

The Court delivered the following

Coutts Trotter, J.

Judgments :—*Coutts Trotter, J.*—In a recent case my brother Spencer, J., and I had occasion to consider a question analogous to that which arises for determination here. All the decisions were cited before us, and having regard to their conflicting nature it is not surprising that we had very great difficulty in coming to a conclusion. No judgments were delivered, as the parties came to terms. But during the course of a careful and lengthy examination of the cases, I came to the conclusion that *Venkatagiri*

* A. S. No. 235 of 1914. 21st December 1915.

1. (1911) 21 M. L. J. 213. (F.B.)
2. (1911) 22 M. L. J. 129.
3. (1879) I. L. R. 2 M. 108.
4. (1900) I. L. R. 24 M. 171.

Chinnu Pillai v. Venkatasamy Chettiar.

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v. *Sadagopachariar* [1], was in conflict with the Full Bench decision in *Mulla Vittil Seethee* v. *Achuthan Nair* [2], and that if the former case was wrongly decided, then *Venkatanarasammah* v. *Ramiah* [3] could not stand either. My brother in the Judgment which he is about to read and which I have had the advantage of perusing has exhaustively reviewed the cases; and I assent entirely both to his conclusions and the reasoning by which they are reached. Speaking for myself, I think the matter is made plain when two fundamental principles, which I will endeavour to formulate in my own words, are grasped. The first is, that what passes to a mortgagee is a right to sell the mortgagor's interest as it stood at the date of his mortgage, subject only to this, that in his suit he must make all subsequent mortgagees parties if he wishes the sale to be free of their encumbrances. The other principle is, that of any number of mortgagees; the later can always redeem the earlier, but cannot be compelled to do so, and the earlier cannot redeem the later except by consent. Apply these principles to the present case and what is the result ? The plaintiffs have a right to sell their mortgagor's interest as it stood at the date of their mortgage. At the date of their mortgage, it was subject to the two prior encumbrances; therefore they can only sell subject to those encumbrances. The fact that there had been a previous sale by a prior encumbrancer does not affect their rights, as they were not made parties to that suit. In that suit the 2nd mortgagee could have sold the property as it stood at the date of his second mortgage *i. e.*, subject only to the 1st mortgage, but he did not comply with the condition that in order to effect this he must join subsequent encumbrancers. The result is, as I have said, that the 3rd mortgagee can sell the property subject to the prior mortgages. The prior encumbrancers cannot redeem the later; the later can, but need not redeem the earlier. It follows that the decree made in this case was right and the appeal must be dismissed.

The necessary result of our decision is to dissent from *Venkatagiri* v. *Sadagopachariar* [1] and *Venkatanarasammah* v. *Ramiah* [3] and I have considerable difficulty in distinguishing *Ramayya Chettiar* v. *Parthasarathy Naicker* [4] from those cases. In my opinion all these cases are inconsistent with the principles

1. (1911) 22 M. L. J. 129.
2. (1911) 21 M. L. J. 213. (F. B.)
3. (1879) I. L. R. 2 M. 108.
4. (1900) I. L. R. 24 M. 171.

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embodied in the Full Bench Judgment in *Mulla Vittil Seethee* v. *Achuthan Nair* [1] and as I am bound by the Full Bench Judgment, to which I respectfully give my complete concurrence, I am unable to treat them as authorities binding upon me.

Srinivasa Aiyangar, J:—This is an appeal by the 2nd defendant. There were three simple mortgages on certain premises. The plaintiffs' is the 3rd. The 2nd mortgagee sued for sale on his mortgage, obtained a decree and sold the properties; the 2nd defendant is the purchaser at the court sale. After his purchase he has redeemed the 1st mortgage. To the suit of the 2nd mortgagee the plaintiffs were not made parties. The 2nd defendant's position is therefore that of an assignee of the first two mortgages and of the equity of redemption subject to the charge of the plaintiffs. The plaintiffs now sue for sale subject to the two prior mortgages and the question is whether they are entitled to that relief. The 2nd defendant says that the plaintiffs cannot get a decree for sale subject to the two prior mortgages, but must first redeem them and then bring the properties to sale, unless the 2nd defendant redeems him as the ultimate owner of the equity of redemption; while the plaintiffs insist that they are not bound to redeem, as they are not affected by the previous decree, but are entitled to bring the properties to sale subject to the prior mortgages. The actual decree passed is one for sale free of all encumbrances, unless the 2nd defendant redeemed the plaintiffs. The learned pleader for the appellants says, that if we decide that the plaintiffs are entitled to a decree for sale subject to the previous mortgages, he is content to leave the decree as it is. The learned pleader for the appellants raised a further point in appeal which was not raised in the first court *viz.* that he is in a position to prove that the plaintiffs' mortgage was granted when the suit of the 2nd mortgagee was pending, and they were affected by *lis pendens*. As this point if allowed would necessitate a fresh plea and investigation on facts, we have declined to hear him on this point. The only question therefore for determination is, whether a puisne mortgagee who is not made a party to a suit for sale by a prior encumbrancer, is entitled to insist on a decree for sale subject to the previous mortgage. The rights and liabilities of a puisne encumbrancer not made a party to a suit for sale by the senior encumbrancer were elaborately discussed

1. (1911) 21 M. L. J. 213. (F. B).

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and all the cases were reviewed by a Full Bench of this Court and the conclusions arrived at were formulated in the shape of four propositions at the end of the judgment, (*Mulla Vittil Seethee* v. *Achuthan Nair*) [1]. If those propositions are correct the answer to the question in this case must be in the affirmative. The learned pleader for the appellants however contends that those propositions are really *obiter* and therefore not binding on us; that they were so treated in *Venkatagiri* v. *Sadagopachariar* [2]; that the present case is in all fours with *Venkataramana Iyer* v. *Gompertz* [3] which is referred to and not dissented from in the Full Bench case. I may say at once that I do not consider that the propositions of law deduced by the Full Bench from a review of the previous authorities are merely *dicta;* they are the principles on which the actual decision in the case depended and are binding on us. Further as I think (if I may say so without presumption) that those propositions correctly lay down the law, I do not think it necessary to discuss the authorities cited therein. The decision in *Rangayya Chettiar* v. *Partharasathi Naicker* [4] which is approved of in the Full Bench case and followed in *Venkataramana Aiyar* v. *Gompertz* [5] on another point, is on all fours with the present case and is conclusive against the appellants.

The later case of *Venkatagiri* v. *Sadagopachariar* [3] however, appears to be in conflict with the Full Bench decision and I therefore propose to examine it more especially as there are *dicta* in some of the cases cited therein which appear to me to be incorrect.

Under the Indian practice a mortgagee who sues to realise his security by sale of the mortgaged properties must make all persons, who have acquired an interest in the properties subsequent to his mortgage, parties to the suit, but a puisne encumbrancer need not make prior encumbrancers parties. (O. XXXIV, R. 1 of the Code of Civil Procedure). I do not pause to consider what will be the effect of a covenant not to alienate (*pactum de non-aliendo*) on the duty of a mortgagee to make subsequent alienees parties, *Venkata* v. *Kannan* [6] *Shields* v. *Schiff* [7]. A mortgagee obviously cannot foreclose or sell without making the ultimate owner of the equity of redemption a party

1. (1911) 21 M. L. J. 213.
2. (1911) 22 M. L. J. 129.
3. (1908) I. L. R. 31 M. 425.
4. (1896) I. L. R. 20 M. 120.
5. (1911) 22 M. L. J. 129.
6. (1882) I. L. R. 5 M. 184 at 186.
7. 124 W. S. at pp. 357, 358.

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and a senior mortgagee cannot therefore foreclose and sell merely the interest of a junior encumbrancer in the mortgaged property. If he obtains a decree for sale in the absence of the ultimate owner of the equity of redemption it had been doubted whether even the plaintiff mortgagee's right passed to the purchaser, (Ghose on Mortgages page 620). It has however been held in America, where the usual decree is for sale, that a junior encumbrancer is not a necessary, though a proper, party to a mortgagee's suit for sale. (See Jones on Mortgages Ss. 1394 and 1395). Under the statute in India he is a necessary party, though if he is not made a party and a decree is obtained, the decree would not be void, but ineffective to affect the rights of the encumbrancer not joined; and the purchaser in an execution sale held under that decree would be in no better position than if he had obtained an assignment of the rights of the encumbrancers who were parties to the suit and a transfer from the owner of the equity of redemption. The puisne mortgagee unless he disputes the senior mortgage or its priority, or desires to ascertain the amount due, or redeem or obtain a sale of the mortgaged property free of his incumbrance (which can only be done with his consent, *Wickenden* v. *Raysan* [1],) should not make a previous mortgagee a party. The puisne mortgagee has the right to bring to sale the property as it stood at the time of his mortgage and that right which is secured to him under S. 67 of the Transfer of Property Act cannot be taken away by a proceeding to which he was not a party. In *Moulton* v. *Cornish* [2], decided by the New York Court of Appeals it was said: "The right to a judicial sale of the mortgaged property to pay the mortgage debt is in this state one of the incidents of the mortgage contract; and if the mortgagor is in default, the mortgagee is entitled to the enjoyment of this right unimpaired. It can only be secured to him by a sale in an action or proceeding to which he is a party; for in all such cases the sale is made for the benefit of all parties interested and the proceeds are distributed among them in the order of the priority of their respective liens. The 2nd mortgagee possessed the right to maintain an action upon it for the foreclosure of so much of the equity of redemption as remained in the mortgagor at the time when it was recorded and for a satisfaction of the debt secured by it by a sale of the mortgaged premises.

1. (1855) 6 De. G. M. and G. 210. 2. 138 N. York 133.

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This right is so important in these cases that the holder of the mortgage cannot be deprived of it without at the same time impairing and depreciating the security created by the mortgagor. Where it is a 2nd mortgage and the mortgagee is made a party to the foreclosure of a prior mortgage full effect is given to this power of sale, by means of the sale directed in the action or proceeding which as we have seen is made for the benefit of all the parties served with process or notice". Again speaking of the 1st mortgagee purchaser who sued to compel the puisne encumbrancer (who was not party to the previous suit) to redeem or to be foreclosed, it was said "But she occupies no better position with respect to the defendant than if she had taken a deed from the mortgagor and an assignment of the other encumbrances and had gone into possession. As to the defendant her mortgage is still unforeclosed and the estate which the mortgagor had when he executed the defendant's mortgage is still subject to its lien. The plaintiff may at any time foreclose her mortgage as against the defendant notwithstanding the former defective foreclosure. It imposes no hardship to require her to pursue such course if she wishes to rid the title of the lien of the defendant's mortgage." As the plaintiff in that suit had not made purchasers of other portions of the mortgaged estate, parties to the suit, the court after holding that if the plaintiff desired she might be allowed to amend the plaint by making them parties proceeded to observe "if the plaintiff obtains leave to amend by bringing in all the necessary parties she may have a decree for a foreclosure of her mortgage as against the defendant and a sale of the mortgaged premises. This is the extent of the relief to which she is entitled." I have made this long extract as I think it expresses precisely what I wish to say. The rights and liabilities of senior and junior simple mortgagees under the Transfer of Property Act are exactly the same as stated in the above opinion. In order to avoid misapprehension I should say that except in a very few States in America, the theory of the mortgagee being the legal owner is discarded, and foreclosure as understood in English practice called "strict foreclosure" is not the ordinary remedy, but the ordinary remedy of a mortgagee is sale which is sometimes called "ordinary foreclosure" or "foreclosure sale," though in exceptional cases strict foreclosure is awarded. The mortgages referred to are what are known as English mortgages as defined by the

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Transfer of Property Act. I need hardly point out that in the case of simple mortgages under the Transfer of Property Act, sale is the only remedy and the courts have no jurisdiction to order strict foreclosure in any case.

Applying the above principles, the puisne mortgagees in this case who have made the present owner of the equity of redemption *viz.*, the 2nd defendant, a party, are entitled to a decree for the sale of the security as it stood at the date of their mortgage, *i. e.*, the properties subject to the 1st and 2nd mortgages. The fact that the 2nd defendant happens also to be the assignee of the 1st and 2nd mortgages cannot in any way affect or prejudice the plaintiffs.

It is, however, contended that if the senior mortgagee is in fact made a party though the plaintiff does not seek any relief in respect of the prior mortgage, the plaintiff must redeem; on what principle this argument is based I am unable to see. It will be observed that the plaintiffs have no choice in the matter of making the 2nd defendant a party and why any action of 3rd parties behind their back should prejudice their rights it is impossible to understand. The case in *Venkataramana Aiyar* v. *Gompertz*[1] is, as pointed in the Full Bench case, no authority for that position. In that case the plaintiff asked in the alternative for redemption of the previous mortgages and sale. That of course he was entitled to ask though he was not bound to. The decision proceeded on the basis that as the plaintiff had asked for the relief, though in the alternative, the court for finally adjusting the rights of all parties, can make a decree in that form. If the decision goes further, and was intended to decide that the defendant who happens to be also a prior mortgagee can compel the plaintiff to redeem in the sense that unless he so redeems his suit must be dismissed, I am unable to agree. Even if the defendant had instituted an action to compel the puisne mortgagee to redeem (and no such action can be instituted as I have said above without making the owner of the ultimate equity of redemption a party) the only relief which the senior mortgagee can have in default of redemption is sale of the property free of all liens and payment of his mortgage in priority, then payment of the mortgage of the junior encumbrancer and the payment of the balance, if any, to himself as the owner of the equity of redemption. In no

1. (1908) I. L. R. 31 M. 425.

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case can a prior simple mortgagee extinguish the right of the puisne mortgagee by foreclosure. Sufficient attention has not always been paid to this important fact, when it is said that the junior mortgagee is bound to redeem, or his only right is to redeem or that the senior mortgagee can compel redemption.

In the Full Bench case the actual decision was that a senior simple mortgagee who had purchased in execution of a decree for sale against the mortgagor had no right to recover possession of the property from a puisne usufructuary mortgagee who was not a party to the previous suit. The senior mortgagee had the right to compel the junior mortgagee to redeem, but if he did not, his mortgage cannot be extinguished, so as to enable the 1st mortgagee purchaser to obtain possession as if the 2nd mortgagee had been satisfied; he might be entitled to sell the property in which case both his and the 2nd mortgage will have to be paid out of the sale proceeds. So also in the present case if the 2nd defendant had instituted a suit against the plaintiffs (and he would I think be entitled to do so though he had already sued the mortgagor) he could have obtained a decree for sale of the property free of all encumbrances, and all the mortgages would be paid out of the sale proceeds in the order of priority. He certainly cannot have a larger right as a defendant. If he wants to keep the property as purchaser he can only do so by redeeming the plaintiffs.

In *Venkatagiri* v. *Sadagopachariar*[1], the 1st mortgagee first sued without making the 2nd mortgagee a party, as he ought to have done, and obtained a decree for sale. The 2nd mortgagee next brought his action for sale and obtained a decree for sale subject to the 1st mortgage. The 1st mortgagee was a party to this suit, but he need not have been made a party. The mortgagor was a party to both the suits. Both the decrees were executed and the mortgaged properties were purchased by different persons. The question was which purchaser was entitled to possession as owner. It is to be observed that at the time of the institution of the 2nd suit the 1st mortgagee had not brought the properties to sale, and the mortgagor was still the owner. The 2nd mortgagee's suit was therefore properly constituted, to entitle him to sell the property subject to the lien of the 1st mortgage. The 1st mortgagee's suit was improperly constituted and a purchaser

1. (1911) 22 M. L. J. 129.

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in execution of that decree cannot, I think, have a better or larger right than if he was a private assignee of the equity of redemption from the mortgagor during the pendency of a suit for sale against his vendor. I should therefore hold that the purchaser at the sale in execution of the 2nd mortgagee's decree was entitled to the possession of the property as the owner of the ultimate equity of redemption. The purchaser under the 1st decree who is practically in the position of an assignee of the rights of the 1st mortgagee may be entitled to bring a suit for sale against the purchaser in the 2nd mortgagee's sale, but the latter would be entitled to the balance of the sale proceeds after satisfying the 1st mortgagee, which shows that the purchaser at the 1st mortgagee's sale does not really acquire the ultimate equity of redemption. This, I think, is perfectly right on principle. Take a case in which the 1st mortgagee obtains a decree for sale without making the 2nd mortgagee a party and brings the property to sale which is purchased either by himself or a stranger. If after this the 2nd mortgagee brings his suit for sale, he must make the previous purchaser party; but can obtain a decree for sale, and the purchaser at that sale would be entitled to possession from the previous purchaser. If that would be the result if the purchase had been made before the second suit was instituted, the same result must follow if the purchase was made during the pendency of the 2nd suit. The principle of *lis pendens* would apply. No doubt the purchaser at the first sale, if he buys after the institution of the 2nd mortgagee's suit, may be entitled to redeem standing in the shoes of the mortgagor, or he may join as a party in the 2nd suit and apply for a sale of the property free of encumbrances or if there be a sale subject to his own first mortgage may claim to be paid the balance of the sale proceeds after satisfying the plaintiff's 2nd mortgage. His previous purchase by itself does not entitle him to have or to keep possession of the mortgage premises as against the purchaser in the second sale. If the 2nd sale was subject to the 1st mortgage, he can no doubt bring a fresh action for sale against the 2nd purchaser. The doctrine of *lis pendens* cannot of course affect titles or rights acquired prior to the institution of a suit, nor rights acquired from or through persons not parties to a suit. The difficulty arises from the fact of the mortgagor, as the owner of the ultimate equity of redemption being a party to two

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different suits for sale, instituted by the 1st and 2nd mortgagees respectively without making the other a party. But a moment's consideration will show that the right of the 1st mortgagee to sell the equity of redemption is a right to sell it as it stood at the date of his mortgage, which he can enforce only in a proceeding to which the 2nd mortgagee is a party; otherwise the sale at the best can convey to the purchaser only the equity of redemption subject to the 2nd mortgage. The second mortgagee is left free to enforce his security. As the first mortgagee is not a party to the 2nd mortgagee's suit the right of the purchaser in his sale to sue as a first mortgagee may not be affected, but his right to hold as a purchaser of the equity of redemption would.

In the case in *Venkatagiri* v. *Sadagopachariar* [1], (and similar observations occur in several other cases) it is said that "as both of them (*i.e.*, the 1st and 2nd mortgagees) are entitled to bring to sale (the equity of redemption) the first sale puts an end to the mortgagor's interest and conveys it to the purchaser. If therefore the 1st mortgagee sells the property, before the puisne mortgagee, then there is nothing for the latter to sell;" but this ignores the fact that the first purchaser purchases it subject to the right of the 2nd mortgagee to sell. The judgment is also vitiated, if I may respectfully say so, by the erroneous assumption that the puisne mortgagee has only a right to redeem in the sense that unless he so redeems, his mortgage-interest becomes extinct. In other words, a simple mortgagee who does not conform to the provisions of the law, by not making a puisne mortgagee a party becomes entitled to a right of strict foreclosure; a wholly unreasonable result. It is said that "each mortgagee might go on *ad infinitum* without making the other a party." If the view which I have set forth is correct, in the case where the 1st mortgagee had omitted to make the 2nd mortgagee a party, and proceeded to sale, the purchaser whether himself or another, can bring a fresh suit for sale making the 2nd mortgagee a party; or he can as a defendant when the 2nd mortgagee instituted a suit for sale, insist on a sale of the property free of his mortgage, or if he had not proceeded to sale before the 2nd mortgagee's sale, he can, though not made a party, get the necessary relief by applying for sale free of encumbrances in the mortgagee's suit, or the 1st mortgagee can again sue or if he sells under his decree the purchaser can. There cannot be more than 3 suits at the most and if the 1st mortgagee's

1. (1911) 22 M. L. J. 129.

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action had been properly constituted there cannot be more than one suit. They cannot go on *ad infinitum*. The principle should be that the purchaser in the properly constituted suit is entitled to the ownership of the properties and if these two suits by the 1st and 2nd mortgagees respectively are both properly constituted, the purchaser in the 1st mortgagee's suit is so entitled.

I shall now briefly refer to the cases cited in *Venkatagiri* v. *Sadagopachariar* [1].

The first is *Venkatanarasammah* v. *Ramiah* [2], which is similar to the principal case. One learned Judge was of the opinion that the 2nd mortgagee's right still subsisted and that the first purchaser took the property subject to the 2nd mortgage which, it was said, can be enforced in a separate suit. The other learned Judge, though he did not express any final opinion, thought that the 2nd mortgagee's right was practically extinguished. Nobody now contends that the latter view is correct. Taking the former *viz.*, that the 2nd mortgagee can assert his rights in a separate suit, there is no indication in the judgment that such right is only a right to redeem, in default of exercise of which, the mortgage becomes extinguished. Therefore it comes to this: though the 2nd mortgagee is entitled to bring a fresh suit against the purchaser in the 1st sale to sell the property for the satisfaction of the 2nd mortgage debt subject to which the first purchaser took (that I think necessarily follows from the Full Bench decision) yet the whole of the proceedings taken by the 2nd mortgagee to realise his security, which proceedings were regularly and properly constituted, in which he was entitled to get *viz.*, the sale of the premises subject to the first mortgage, becomes wholly infructuous not owing to any fault of his, but because a purchaser comes into existence *pendente lite*, whose purchase is in execution of a decree in a suit improperly constituted. I say it with all humility, but I am not able to see either the logic or the justice of it. It may be said that the 2nd mortgagee may apply to be made a party in the first mortgagee's suit; so also the first mortgagee can make himself a party in the second mortgagee's suit. Further the 2nd mortgagee may not know of the existence of a suit by the 1st mortgagee, as there is no system of registration of *lis pendens* here. So far as the 1st mortgagee is concerned, there is generally no excuse for his not making a puisne mortgagee

1. (1911) 22 M. L. J. 129. 2. (1879) I. L. R. 2 M. 108.

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a party, for in a large majority of cases a search of the register of immovable properties would show the existence of all incumbrances, and in the few cases in which mortgages for less than Rs. 100/ may be made by delivery of possession, such possession would be sufficient to give notice to the 1st mortgagee. Why then should the 2nd mortgagee or the purchaser in his sale be driven to another suit, when the 1st mortgagee who had omitted to make the 2nd mortgagee a party can and ought to sue again? I am, of course, dealing with the case of two simple mortgages. If the 1st mortgage was an English mortgage and if without negligence the 1st mortgagee obtains a decree for sale without making the 2nd mortgagee a party and there is a sale, the purchaser may in some exceptional cases obtain an order for foreclosure against the 2nd mortgagee in default of redemption, though even in such cases the proper order ordinarily should be sale; (20 Law Reports Annotated page 370). Though this decision had not been dissented from in the Full Bench case, it is really inconsistent with the principles laid down therein and ought not to be followed.

The next case is *Krishnan* v. *Chadayan Kutti Haji* [1]. There the 2nd mortgagee set up his rights in certain claim proceedings and there was an adverse order against him. He did not challenge it by a regular suit within the time limited and was therefore disentitled to claim his rights as 2nd mortgagee thereafter. The case is also otherwise distinguishable.

Rangayya Chettiar v. *Parthasarathi Naicker* [2], is as I have already said on all fours with the present case. There, as in this, at the time when the suit of the 2nd mortgagee was instituted, there had been a sale in execution of the 1st mortgagee's decree, and the purchaser who became the owner of the ultimate equity of redemption was made a party and a sale of the property subject to the 1st mortgagee was directed.

Muhammad Usan Rowthan v. *Abdulla* [3] seems to be *ad idem* with the case in *Rangayya Chettiar* v *Parathasarathi Naicker* [2], but a contrary conclusion was arrived at. One of the learned Judges who was a party to both the decisions was able to distinguish the previous case; I confess I do not understand the difference, though as suggested in the Full Bench case the decision in *Rangayya Chettiar* v. *Parthasarathi Naicker* [2] probably

1. (1892) I. L. R. 17 M. 17. 2. (1896) I. L. R. 20 M. 120.
3. (1900) I. L. R. 24 M. 171.

rested on the interpretation of the decree in the 2nd mortgagee's suit.

Akatti Moidin Kutty v. *Chirayil Ambu* [1], purports to follow the decision in *Venkatanarasammah* v. *Ramiah* [2] and does not require any detailed consideration; but the actual decision seems to be quite right as the purchaser in the 2nd mortgagee's sale was held to be the owner.

The decision in *Kutti Chettiar* v. *Subramania Chettiar* [3] gives effect to the principle I have formulated though the decision appears to have been based merely on the priority of sales.

The decisions in this court purport to follow the decisions in *Nanack Chand* v. *Teluckdye Koer* [4], and *Dirgopal Lal* v. *Bolakee* [5]. At that time the practice in mortgage suits was not settled, and decrees were executed as if they were mere decrees for money by attachment and sale. The statement in the judgments that the purchaser was holding as a trustee for the mortgagor subject to redemption shows that the previous decrees, in execution of which the sales took place, were mere money decrees, and not decrees for sale in suits by a mortgagee to enforce his right to realise the security. To a suit on the covenant to pay, none but the mortgagor need be made a party, and if a sale of the equity of redemption is permitted in execution of such a decree it is obvious that the 1st purchaser would be entitled to possession. These decisions are not authorities for the position that in a mortgage sale the 1st purchaser is always entitled to possession.

Taking then two simple mortgagees, their rights and liabilities will be as follows:—1. If the second mortgagee sues first, he can without making the first mortgagee a party, sell the property subject to the first mortgage; the purchaser will become the owner of the equity of redemption instead of the mortgagor but subject only to the first mortgage as the second mortgage is extinguished, by the sale. The 1st mortgagee can sue to recover his mortgage-money by sale without making the 2nd mortgagee or the mortgagor a party but only the purchaser. If he wants a personal decree against the mortgagor, he can also be joined in the same suit.

1. (1902) I. L. R. 26 M. 486.
2. (1879) I. L. R. 2 M. 108.
3. (1909) I. L. R. 32 M. 485.
4. (1879) I. L. R. 5 C. 265.
5. (1879) I. L. R. 5 C. 269.

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2. If the 2nd mortgagee sues first, he can join the 1st mortgagee and redeem him and sell the property and realise the amount due on both the mortgages.

3. If the 2nd mortgagee sues first, he can join the 1st mortgagee, and with his consent ask for a sale of the property free of all encumbrances. The sale-proceeds will be distributed according to priority.

4. If the 2nd mortgagee sues first without making the 1st mortgagee a party, the 1st mortgagee may in execution of the 1st decree require the property to be sold free of his mortgage and if the amount due to him is admitted the court can order a sale free of all incumbrances.

5. If the 2nd mortgagee sues first without making the 1st mortgagee a party, the 1st mortgagee can, while the 1st suit is pending, sue for sale making the 2nd mortgagee and the mortgagor a party in which case there can be no sale in the 1st suit and if there had been a sale pending the 1st mortgagee's suit, the purchaser will be affected by *lis pendens*. He can redeem the 1st mortgagee in which case there will be no sale in the 1st mortgagee's suit or if there is a sale, can claim the balance of the sale-proceeds after payment to the 1st mortgagee, as both the 2nd mortgagee and the mortgagor must be presumed to have obtained the value of their interests in the property out of the sale proceeds in the first sale. In this case, the purchaser under the second sale gets the property and is entitled to possession against the 1st purchaser.

6. If the 1st mortgagee sues first, making the 2nd mortgagee a party as he ought, there cannot be a trial of a further action.

7. If the 1st mortgagee sues first without making the 2nd mortgagee a party, the 2nd mortgagee is not affected and can bring his own action for sale making the mortgagor a party if there had been no sale in the 1st mortgagee's suit or if there had been a sale making the purchaser a party in his capacity of the ultimate owner of the equity of redemption; and the purchaser in the 2nd mortgagee's execution sale gets a good title to the property. He is not affected by any *lis pendens*, while any purchaser in the first mortgagee's sale would be.

I therefore think the appeal fails and must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

Palikandy Mammad ... *Appellant* * (*Petitioner.*)

v.

Chingoran Keloth Valia Appa *alias* Krishnan Nair ... *Respondent* (*Cr. Petitioners.*)

Palikandy Mammad *v.* Chingoran Keloth Valia Appa *alias* Krishnan Nair.

C. P. Code (*Act V of* 1908) *S.* 60 (*n*)—*Right to future maintenance—Whether attachable in execution of decree.—Appointment of receiver—Civil Procedure Code S.* 51 (d), *O.* 40, *R.* 1.

A right to future maintenance is not liable to attachment in execution of a decree. Nor can a receiver be appointed in execution for realising such maintenance and applying it in satisfaction of the decree.

A receiver can be appointed in execution only in respect of property which has been the subject of attachment.

Appeal against the appellate order of the Court of the Temporary Subordinate Judge, Tellicherry, in A. S. No. 74 of 1913 preferred against the order of the Court of the District Munsif of Tellicherry in E. P. No. 648 of 1912 (O. S. No. 415 of 1906).

K. R Subramania Sastri for Appellant.

T. S. Narayana Aiyar for Respondent.

The Court delivered the following

Moore, J.

Judgments:—*Moore, J.*—Under a family karar Ex. A the respondent, the deposed karnavan of the tarwad was allotted properties yielding an annual income of 1120½ edangalis of paddy and Rs. 92-4-0. The karar further provided that the respondent should be paid Rs. 276/-every year in monthly instalments of Rs. 23/-before the 5th of each month for the purpose of meeting extra expenses such as entertaining guests. The appellant who holds a money decree against the respondent applied for the appointment of a receiver to realise the monthly allowances as they fell due in satisfaction of his decree debt. Both the Lower Courts held that the right to receive future maintenance could not be attached, and that a receiver could not be appointed to collect the allowance due to the respondent. Mr. Subramania Sastri for the appellant contends that the Lower Courts have misconstrued the karar and erred in holding that the allowance in question is maintenance, that the monthly allowance is property which can

* A. A. A. O. No. 90 of 1914, 9th February 1916.

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be attached, and that the proper and convenient course would be to appoint a receiver to collect the monthly instalments.

I think that it is clear upon the construction of the document that the sum of Rs. 276/- which is payable in monthly instalments forms part of the respondent's maintenance allowance, and that it represents an extra allowance granted to the respondent to enable him to maintain the dignity of his position as a retired karnavan of the tarwad. It is not however made payable out of any definite fund or estate, nor is any charge created. The allowance in question is clearly not a debt—a debt must be specific existing and definite. (*Syed Tuffuzool Hossein Khan* v. *Raghunath Pershad* [1]), and not merely a sum of money which may or may not become payable at some future time, and the payment of which depends upon contingencies which may or may not happen. *Harridas Acharjia Chowdhry* v. *Baroda Kishore Acharjia Chowdhry* [2]. S. 60 (*n*) Civil Procedure Code provides that "a right to future maintenance" shall not be liable to attachment or sale, the prohibition being presumably based on grounds of public policy. The learned vakil for the respondent argues that the right of the judgment-debtor to receive a monthly allowance is a right to future maintenance within the meaning of S. 60 (*n*) Civil Procedure Code, that such right is not assignable, and that it cannot be attached prospectivly before it becomes due.

The question whether a right to future maintenance can be attached and sold has been exhaustively considered by Mr. Justice Mookerjee in *Asad Ali Molla* v. *Haidar Ali* [3], and *Tara Sunderi Debi* v. *Saroda Charan Banerjee* [4] in which the various decisions on the point are reviewed. The learned Judge observes at page 151 of the report that "while the cases in the books are by no means easy to reconcile on any intelligible principle, there is a well marked distinction between two classes of cases, namely, the one in which the right is merely to receive an allowance by way of maintenance periodically, and the one in which the right relates to immovable property granted and accepted in lieu of a periodical allowance for maintenance," and at page 156 "that the true test to be applied, when a question arises as to whether a right to maintenance is assignable or not, is whether the intention of the grantor was to create a purely personal right to receive a certain sum of money in the grantee, and consequently inalienable, or

1. (1871) 14 M. I. A. 40.
2. (1899) I. L. R. 27 C. 38.
3. (1910) 12 C. L. J. 130.
4. (1910) 12 C. L. J. 146.

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whether his intention was to create an interest in property, either a fund or an estate which should be treated as alienable property." A similar test has been applied in England. It has been held that alimony payable to a wife is not assignable because it is not in the nature of property but only money paid by the order of the Court from time to time to provide for the maintenance of the wife. *In re Robinson* [1]. See also *Pagume* v. *Suary* [2]. "On the other hand, a life annuity is assignable. In *Holmes* v. *Millage* [3] the Court of Appeal held that the Court has no jurisdiction to enforce satisfaction of a judgment debt by appointing a receiver of the future earnings of a judgment-debtor, and that unless a man has assigned or charged his future earnings or has made a sum payable out of them, they cannot be prospectively impounded by any of his creditors by any ordinary process of execution, whether legal or equitable." Coming now to the Madras decisions cited by the appellant's Vakil, in *Vaidyanatha* v. *Eggia* [4] which followed *Muthukumara Chettiar* v. *Sundara Kumara Ettappa Sami* [5] it was ruled that a hereditary right to an allowance out of the melvaram of certain lands was attachable but that case is, we think distinguishable on the ground that a heritable right is not a mere personal right and consequently ought to be treated as assignable.

In *Muthukumara Chettiar* v. *Sundara Kumara Ettappa Sami* [5] Mr. Justice Subramania Aiyar observes that the word "maintenance" in S. 266 of the Code of 1882 means nothing more than personal sustenance the right to which must under any circumstances cease with the life of the party entitled thereto, while a right of annuity payable to a man and his heirs is not a personal and limited right of that character. The decision in *Nanam al* v. *Collector of Trichinopoly* [6], where it was held that a decree for maintenance is a right to future maintenance and under S. 266 of Act XIV of 1882 cannot be attached nor can it be treated as a money decree as against the appellant. *Govinda Pillai* v. *Meenatchi Achi* [7] does not also help the appellant. What was held in that case was that the crops standing on land allotted to a widow for maintenance were her property and as such available for her debts and could be attached and

1. (1884) 27 Ch. D. 160.
2. (1909) 1 K. B. 688.
3. (1893) I. Q. B 551.
4. (1907) I.L.R. 30 M. 279.
5. (1899) 9 M. L. J. 113 at p. 115.
6. (1909) 20 M. L. J. 97.
7. (1911) 22 M. L. J. 204.

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consequently did not fall within the interdiction in clause (n) of S. 60 of the Civil Procedure Code.

The learned Vakil for the appellant has referred us to *Ranee Annapurni Nachiar* v. *Swaminatha Chettiar* [1]. In that case a widow had hypothecated her claim to past and future maintenance and the plaintiffs asked for the appointment of a receiver to collect the amounts hypothecated and for a decree ordering the sale of the hypotheca. The observations of the learned Judges at page 9 of the report lend some support to the appellant's contention that a right to future maintenance is transferable but the actual point decided was that, where the amount payable for maintenance is subsequently fixed by agreement or decree a transfer of such an interest may be valid. The learned Judges did not express any opinion on the question whether a right to future maintenance is liable to attachment.

Following the rulings in *Nanammal* v. *Collector of Trichinopoly* [2] and *Tara Sundari Debi* v. *Saroda Charan Bannerjee* [3], I am inclined to hold that a mere right to future maintenance is not liable to attachment and sale and that the appellant was not entitled to attach the monthly allowance payable to the respondent for maintenance. I am also of opinion that the Lower Courts were right in holding that they had no power to appoint a receiver to collect the future maintenance due to the respondent. The learned Vakil for the appellant relies on S. 51 (*d*) of the Civil Procedure Code but that section merely declares in general terms the powers of a Court to enforce execution, one of which is by the appointment of a receiver. R. 1 of O. 40 of the Civil Procedure Code gives power only to that Court in which the suit is brought or by which the property has been attached to appoint a receiver. The said right to receive future maintenance is not property and cannot be attached. "A Court cannot appoint a receiver except it has seisin of the property either by a suit being pending or by a proceedings in execution of a decree made in a suit being pending and attachment having been made." See Ameer Ali and Woodroffe's Civil Procedure Code page 1186.

The learned Vakil for the appellant relies on *Monessur Doss* v. *Beer Pratab Sahee* [4]. In that case, maintenance payable in instalments had been awarded by a decree, and it was held that

1. (1910) I. L. R. 34 M. 7.
2. (1909) 20 M. L. J. 97.
3. (1910) 12 C. L. J. 147.
4. (1871) 15 W. R. 188.

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the Court might at the instance of a person who held a decree against the maintenance decree-holder make an order for the non-payment of an instalment by the party chargeable and for its non-receipt by the decree-holder (judgment-debtor in the second suit) *i. e.*, by the issue of a prohibitory order. In Amir Ali and Woodroffe's Commentaries on the Civil Procedure Code the learned authors say at page 293 that this has not been the practice since. See *Harridas Acharjia Chowdhury* v. *Baroda Kishore Acharjia Chowdhury* [1]. In *Udoy. Kumari Ghatwalin* v. *Hari Ram Shaha* [2] the learned Judges, while holding that future rents and profits due to a ghatwal cannot as such be attached in execution of a decree against him sent the case back to the Lower Court with directions to consider the propriety of appointing a receiver to collect the rents and profits as they fell due. The facts of that case are however plainly distinguishable from the present one.

In the result the appeal fails and is dismissed with costs.

Sadasiva Aiyar, J

Sadasiva Aiyar, J. :—I entirely agree. As regards the case *Ranee Annapurni Nachiar* v. *Swaminatha Chettiar* [3], I am inclined with the greatest respect to hold that a right to receive future maintenance cannot be validly alienated. Shephard and Brown in their Commentaries hold that it is not alienable as it is not property within the enabling words of S. 6 of the Transfer of Property Act. The learned Judges following the observation in *Palanippa* v. *Lakshmanan* [4] hold that a right to future maintenance, though not "property" under the Transfer of Property Act and though not attachable under the Civil Procedure Code might be alienable under the principles followed by Courts of Equity in England. We know that Courts of Equity have held that even the contingent right of an heir presumptive can be validly charged. I think that Courts in India are bound by the Transfer of Property Act, the clear implication of S. 6 clauses (d) & (h) of that Act being that a right to receive future maintenance cannot be validly alienated. I think that "a transfer not recognised by the Transfer of Property Act" as legally effective cannot create any right in the alleged transferee.

Mr. Subramania Sastriar contended that if a decree awarding future maintenance can be attached the rights granted by a private

1. (1899) I. L. R. 27 C. 38.
2. (1901) I. L. R. 28 C. 483.
3. (1910) I. L. R. 34 M. 7.
4. (1893) I. L. R. 16 M. 429 at p 434.

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deed to receive future maintenance of definite rates can also be attached but I think we are bound by the decision in *Nanammal* v. *The Collector of Trichinopoly* [1] to hold the contrary. Whatever may be the law in England, it has been held that the law applicable in this country is that "a right to recover damages for assault is not assignable, (See *K. Seethamma* v. *P. Venkataramanayya* [2]. While the prohibition against attachment found in the provison to S. 60 of the Civil Procedure Code and the prohibitions against transfer found in the clauses of S. 6 of the Transfer of Property Act have been both enacted on grounds of public policy, the prohibition against attachment, so far as it relates to some of the properties mentioned in S. 60 of the Civil Procedure Code (such as tools of artisans, necessary cooking vessels, etc.,) is not intended to interfere with the right of the owner to effect private alienations of those properties. The prohibition of private alienation itself found in the Transfer of Property Act rests therefore on rules of public policy of at least equal stringence with the prohibition against attachment and found in the Civil Procedure Code and instead of being sought to be evaded by the Courts should in my opinion be liberally given effect to.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

Tanguturi Subbarayudu ... *Appellantee* * *(Transfer Decree-holder)*

v.

Yerramsethi Seshasani ... *Respondent (1st Defendant).*

Subbarayudu v. Seshasani.

Civil Procedure Code of 1908—*S.* 144—*Scope of*—"*Decree reversed or varied*"—*Meaning*—*Supersession of decree by decree in separate suit*—*Restitution of amount recovered under superseded decree*—*Right to.*

S. 144 of the Code of Civil Procedure is not confined to cases where restitution is claimed on the reversal of a decree in first or second appeal. Provided the decree is varied or reversed the section applies, however the reversal or variance has been effected.

Where an order in execution proceedings over-ruling the objection of the judgment-debtor to the recognition of the transfer of the decree sought to be executed and allowing execution by the transferee was superseded by a subsequent decree, declaring the invalidity of the transfer and restraining him for receiving payment passed in a suit instituted for that purpose by the judgment-debtor against the transferee. *Held* that the judgment-debtor was entitled under the circumstances, to apply

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* C. M. S. A. No. 84 of 1914 11th January, 1916.

1. (1909) 20 M. L. J. 97.
2. (1913) I. L. R. 38 M. 308 at p. 309.

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under S. 144 for the recovery with interest of the amount received from him by the transferee in execution.

Shiam Sundar Lal v. *Kaiser Zamini Begam*[1] doubted.

Appeal against the order of the District Court of Cuddapah in A. S. No. 126 of 1912 preferred against the order of the Court of the District Munsif of Gooty in E. P. No. 412 of 1912 in O. S. No. 985 of 1897.

R. Kuppuswami Aiyar for Appellant.

B. Somayya for Respondent.

The Court delivered the following

Judgment:—The question for determination in this appeal is whether the Lower Courts were right in holding that the respondent was entitled to restitution under S. 144 of the Civil Procedure Code.

One Kamisetti Ghatta as president of a certain fund obtained a money decree against the respondent and two others in O. S. No. 985 of 1897 in the District Munsif's Court, Gooty, on 12-2-1898. One Narayana Rao styling himself president of the fund transferred the decree to the appellant.

The objection raised by the judgment-debtors to the transferee's right to execute the decree was overruled and the transfer was recognised by the Court on 12-7-04. The appellant received Rs. 315-14-4 from the respondent (1st defendant in the suit) in execution on 12-8-04.

Prior to the payment of the decree amount the respondent and another had instituted a suit O. S. No. 479 of 1914 in the Gooty Munsif's Court against the appellant and the transferor for a declaration that the transfer of the decree in O. S. No. 985 of 1897 was invalid, and for an injunction restraining the appellant from executing the decree and receiving the amount deposited in Court.

Finally after a remand by the High Court the District Munsif on 29-11-09 passed a decree (which was affirmed on appeal) declaring the transfer of the decree in O. S. No. 985 of 1897 to be invalid and restraining the present appellant from executing the decree and receiving the amount deposited in Court.

The respondent applied by an execution petition on 22-3-1912 to recover the amount with interest from the appellant. The Lower Court following the ruling in *Shiam Sundar Lal* v. *Kaisar Zamani Begam*[1], held that the respondent was entitled under

1. (1906) I. L. R. 29 A. 148.

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S. 144 of the Civil Procedure Code, to recover the amount which she paid under the decree in O. S. No. 985 of 1897 with interest.

It is contended on behalf of the appellant that S. 144 of the Civil Procedure Code has no application, in as much as there is no decree which has been varied or reversed, the decree under which the money was recovered in execution not having been reversed varied or set aside. The words of S. 144 Civil Procedure Code are very wide, and the section is not confined to cases where restitution is claimed on the reversal of a decree in first or second appeal.

Provided the decree is varied or reversed the section applies, however the reversal or variance has been effected. Reference may be made to *Shama Prasad Roy Choudhury* v. *Hurro Prasad Roy Choudhury* [1] where their Lordships of the Privy Council laid down the law thus: "The original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded the money recovered under it ought certainly to be refunded.........The true question, therefore, in such cases is, whether the decree or judgment under which the money was originally recovered has been reversed or superseded." We think that the Lower Courts' decision can be supported on the ground that the order of that Court passed in E. P. No. 728 of 1904 recognising the transfer in favour of the respondent and allowing execution to proceed, which determined a question arising between the judgment-debtor and the representative of the decree-holder under S. 144 of the Civil Procedure Code was a "decree" as defined in the Code 1882 and that order was superseded by the subsequent decree in O. S. No. 479 of 1904 *between the same parties.* The order for payment made to the appellant in execution of the first decree and the receipt of money by him in pursuance of that order were in fact superseded by the decree for injunction granted against him in the second suit restraining him from receiving such money. It is unnecessary for us to express a final opinion on the question whether *Shiam Sundar Lal* v. *Kaisar Zamani Begam* [2] was rightly decided. In that case the subsequent decree only declared the right of the claimant to an attached property as against the claim put forward by the decree-holder in the first suit to have it attached. The subsequent decree did not grant an injunction against the decree-holder in the first suit to refrain from

1. (1865) 10 M. I. A. 203 at 211 and 212. 2. (1905) I. L. R. 29 A 148.

selling the attached property in execution or from taking possession of it as purchaser (if he happened to become the purchaser at the execution sale). And yet it was held by the learned Judges that restitution of possession could be granted in favour of the successful party in the second suit by a summary application made in the first suit. We may however, say that as at present advised we are not prepared to go to the extreme length that that decision has proceeded.

For the foregoing reasons we have come to the conclusion though not without some hesitation that the view taken by the Lower Courts is right.

The appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Napier.

Muthu Raman Chetty ... *Appellant** (*Defendant*)

v.

Chinna Vellayan Chetti *alias* Chinna Karuppan Chetty. *Respondent* (*Plaintiff*).

Principal and surety—Negotiable instrument—Surety for—Without concurrence of drawer—Liability of principal debtor—Indian Contract Ss. 140, 145,—Ss. 69 and 70, applicability of.

A surety to a negotiable instrument who has become such without the concurrence in the contract of the drawer gets no higher rights against him than an ordinary holder.

He is not entitled to rely on S. 145 of the Indian Contract Act, his rights being confined to those given by S. 140. That section gives him a right of suit on the original obligation but subject to the same limitations as affect the creditor.

Oldfield, J.:—Ss. 69 and 70 Indian Contract Act also are inapplicable to the case.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Sivaganga in Appeal Suit No. 429 of 1913, preferred against the decree of the Court of the District Munsif of Paramakudi in Original Suit No. 204 of 1912.

[The appeal come on for hearing before Mr. Justice Oldfield and Mr. Justice Napier in the first instance.]

The facts are fully stated in Mr. Justice Napier's judgment.

P. S. Narayanaswami Aiyar for *C. V. Anantakrishna Aiyar* for the Appellant.

C. A. Seshagiri Sastri for *K. V. Krishnaswami Aiyar* for the Respondent.

The Court delivered the following

Judgments :—*Oldfield, J.* :—The Lower Appellate Court rejected plaintiff's contention based directly on his position as

* S. A. No. 960 of 1914. 28th January 1916.

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Oldfield, J.

surety. It has, however, been relied on here, and therefore I deal with it before taking up the argument based on the negotiable character of Ex. A, on which the Lower Appellate Court decided in his favour.

The Lower Appellate Court has adopted its findings of fact on this part of the case from the judgment of the Court of First Instance unreservedly. They are that plaintiff bound himself to pay part of his relative's debt to Yegappa Chetty, that in order to do so he sent the suit hundi, Ex. A, for delivery to Yegappa by plaintiff, and that the latter created defendant's original liability by delivering it and, the distinctive feature in the case, made himself surety for its discharge by endorsing that fact on it. This entails not only that defendant did not know of plaintiff's entering and did not ask him to enter into this contract of guarantee, but also that, if the consideration for it was anything done or promised for defendant's benefit, he had no opportunity to adopt or refuse to adopt it. The question is of the nature of his liability to plaintiff in these circumstances. Is there a contract of indemnity between them? Or, as the Lower Appellate Court held, is plaintiff's remedy only that open to the original creditor? And then is it subject to the restrictions imposed on the latter as holder of the hundi, in which his debt was embodied?

It is clear that the distinction involved will be without importance in the majority of cases. For, unless (as here) recovery on the original security is trammelled by the requirements of a special law and unless (as I think is the case here) the establishment of a contract by the debtor to indemnify is impossible, it will not matter on which foundation the suit is brought. And perhaps it is for this reason that the two have not, so far as has been shown us, been explicitly distinguished in any Indian case. English authority however recognises the distinction. For in *Hodgson* v. *Shaw* [1] it is said first "when a person pays off a bond in which he is either co-obligor or bound *subsidiariè* he has at law an action against the principal for money paid to his use, and he can have nothing more. The joint obligation towards the creditor is held to give the principal notice of his payment, and also to prove his consent or authority to the making of that payment. This is necessary for enabling any man who pays another's debt to come against that

1. (1834) 3 Mylne and Keen 183 at p 190=40 E. R. 70.

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other, because a person cannot make himself the creditor of that other by volunteering to discharge his obligations". But the decision goes on "The case standing thus at law, do considerations of equity make any alteration in its aspect? The rule here is undoubted, and it is one founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of a creditor, and have all the rights which he has, for the purpose of obtaining his reimbursement". To apply this distinction to the relevant provisions of the Indian Contract Act, we have S. 140 and the particular application of it in S. 141 representing the principle stated in the second of these extracts, and S. 145 representing that stated in the first, the two first mentioned sections being the basis of the Lower Appellate Court's decision on Ex. A in plaintiff's favour and the last of any claim independent of that document.

It has been necessary to make this clear on two accounts. Firstly, reference was made in argument to S. 126; and the fact that its language does not require the principal debtor to be a party to the contract of guarantee was relied on as entailing that, whether or no he is privy to that contract, the surety can recover from him. The answer is that S. 126 defines only the contract of guarantee between the surety and the creditor and not its incidents as between the surety and the debtor. They are defined elsewhere in Ss. 140, 141 and 145. And secondly the result of the distinction above insisted on is that the two grounds of the debtor's liability are distinct. There is his general liability, which may be supported on the ground of the implied promise to indemnify referred to in S. 145; and there is his special liability under Ss. 140, 141, arising from the surety's right to the creditor's original remedies against him. That liability is no greater and no less than it would have been to the creditor. The point as to it, to which I return, is that in the present case the liability of defendant to the creditor is not alleged as based on the existence of any debt independent of Ex. A or otherwise than on that document. If then plaintiff's claim cannot be supported with reference to S. 145, it will be necessary to consider, not whether he can recover on the general ground of defendant's indebtedness to the creditor, but whether he can satisfy the requirements of the Negotiable Instruments Act with reference to Ex. A.

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Firstly as to S. 145, to the application of which defendant objects on the ground that he die not know of and was in no way privy to plaintiff's contract of guarantee. It would, he argues, be anomalous that the debtor's position should be liable to alteration in consequence of the intervention of a third party between him and his creditor without his knowledge or request and whether or no he had an opportunity to adopt or refuse any benefits it might confer; and in particular that the debtor should be subjected to a different rule of limitation. For under Art. 81 Schedule I of the Limitation Act a suit can be brought by the surety within three years after he has paid the creditor; that is after the date, on which the liability would normally have been defunct, when perhaps the debtor's evidence as to the original debt or its discharge has been lost and he will have to meet evidence as to the making of a contract of guarantee, of which he had no contemporaneous knowledge. There is then in defendant's favour the English law, stated in *Hodgson* v. *Shaw* [1] already referred to and other cases, that the implied rights possessed by the surety are available, when the suretyship has been undertaken at the request, actual or constructive of the principal debtor but not otherwise, since no one can make himself the creditor of another by volunteering to discharge his obligations. In these circumstances, the opposite view must be supported unambiguously by S. 145, if it is to be sustained.

Plaintiff contends that it is so, because the section imposes no qualification on the debtor's liability under an implied contract of indemnity. But that is to misread its terms. For, in fact, it does not refer to a contract of indemnity at all, but only to a promise to indemnify; and a promise, as Ss. 2 (d) (f) and (g) and 25 show, is ordinarily void, when, as here, no consideration has passed between promisor and promisee. S. 25 (2), it should be noticed, has no application, because defendant's promise must be held to have been made in accordance with the terms of S. 145 in the contract of guarantee and at the date of that contract plaintiff had done nothing for him and nothing, which he was legally compellable to do. A kindred argument to that suggested by S. 25 (2) has however been based on the description of the promise in S. 145, as implied, and the alleged intention of the Legislature to bring under it relations

1. (1839) 3 Mylne and Keen p. 183; 40 Eng. Rep. 70.

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between promisor and promisee of the kind dealt with in S. 69 and 70. But firstly this construction does violence to the definition of an implied promise in S. 9. For that definition recognises only distinction between the ways, in which an actual promise may be expressed, not the existence of relations, involving no actual promise, but from which one must be presumed. And next, if the language of the section is to be treated as a lapse into English legal phraseology (*vide* for example Addison on Contracts, 9th Edition, page 424), it has still to be shown how either S. 69 or 70 is applicable. As regards the former, it cannot be said that the present plaintiff was interested in the payment, which he made. For the interests postulated in the section have always been restricted to those arising either in course of law or through mistake or in virtue of some existing relation with the person, on whose behalf the payment is made and have never been held to include interests created officiously, such as that now in question. S. 70, it is no doubt conceivable, might cover cases in which the debtor enjoys the benefit of some postponement of liability in consequence of the surety's promise. But here, the plaint averment is only that, the hundi amount, having been demanded of the firm designated by defendant without any result except a promise to obtain defendant's instructions, was at once paid by plaintiff on demand; and there is no allegation that the creditor at any time intended to sue defendant or expressed any intention to do so or was induced to put off doing so by plaintiff's standing surety. And in any event the authorities do not sanction recovery, when the person primarily liable has no knowledge, actual or imputed, that expenditure is or probably may be necessary on his behalf: and I see no reason for extending the doctrine to cover cases of this nature. Two decisions only, so far as has been shown, deal with instances of expenditure incurred, as here, for another person without any sort of consciousness on his part that it would be or was likely to be incurred. In *Gajapathi Kristna Chandra Deo* v. *Srinivasa Charlu* [1] Sadasiva Aiyar, J. no doubt illustrated his argument by reference to expenditure incurred by way of neighbourly service, when the person benefitted had neither knowledge of, nor option to refuse what was done. But with all respect, I doubt whether the illustration, which was

1. (1913) 25 M. L. J. 433.

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not essential to the argument, represents the law, *Nanak Ram* v. *Mehin Lal* [1] in some respects no doubt resembled the present case; but it was decided with reference to S. 127 and the absence of consideration for a contract between the surety and creditor; and I therefore do not rely on it here. But the foregoing entails the conclusion that in this case the promise to be implied under S. 145 does not amount to a contract of indemnity between plaintiff and defendant, either directly or with reference to S. 69 or 70. And accordingly plaintiff must succeed, if at all, on his claim as based on Ss. 140 and 141.

It has been pointed out that under those sections he is restricted to the remedy available to the creditor that is to a suit on the hundi, Ex. A. I agree with my learned brother that he can sue on it with reference either to the sections referred to or as a holder with reference to S. 59, Negotiable Instruments Act. It is objected that the plaint does not contain the averments appropriate to that cause of action and that it was first relied on in argument before the District Munsif. The defendant, however, in his written statement paragraph 8 had pleaded that the notice of dishonour required by S. 30, Negotiable Instruments Act, had not been given; and, as he obtained, no issue on the point, it is possible that he and the Court overlooked section 140, Indian Contract Act and S. 59, Negotiable Instruments Act, and assumed that plaintiff's payment discharged the hundi and concluded the matter. In the circumstances, I would remand appeal to the Lower Appellate Court for findings on the issues whether.

1. Ex. A was presented for payment within a reasonable time after it was received by the holder with reference to S. 74, Negotiable Instruments Act.

2. Due notice of dishonour was given with reference to S. 30.

Fresh evidence my be taken

Findings are due within six weeks after the re-opening of Lower Appellate Court. Seven days are allowed for filing objections.

Napier, J.

Napier, J.:—This is an appeal from a decision of the Temporary Judge of Sivaganga in Appeal Suit No. 429 of 1913. The suit was brought by one Chinna Vellaiyan Chetti *alias* Chinna Karuppan Chetti against the drawer of a hundi of

1. (1877) I. L. R 1 A. 487.

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Rs. 1,000. A. Peri N. N. Muthuraman Chettiar. The hundi was drawn to bearer and given to one Chidambaram Chettiar. It bears the following words: "Security for this is Chinnakaruppan Chettiar *alias* Peria M. Chinna Vellayan Chettiar." The Lower Appellate Court has found that this endorsement, was made at the request of Chidambaram Chetty who refused to take the hundi without the endorsement, but that the drawer did not consent to this. This being a finding of fact we are bound to accept it. The Court held that the drawer not being a party to the guarantee agreement, the surety could not recover from him on the footing but gave plaintiff the decree on another ground.

It appears that the drawee not having paid the amount, the holder Chidambaram Chetty called on the surety to pay. The surety paid the amount and took the hundi from Chidambaram Chetty. On these facts the Lower Appellate Court held that he was a holder and as such entitled to recover the amount from the drawer. It is argued in appeal that he was not a holder in due course and that notice of dishonour had not been given to the drawer. In my view it is immaterial whether he is a holder in due course or not. He is admittedly the holder for value. A hundi drawn to bearer is negotiable by delivery thereof. (*Vide* S. 47 of the Negotiable Instruments Act, Act XXVI of 1881.) Under S. 59, the holder of a negotiable instrument who acquired it after dishonour by non-payment has only as against the other parties the rights thereon of his transferor. The right of Chidambaram Chetty to whom the hundi was delivered, was to recover the amount from the defendant (the maker) after dishonour, and that right is vested in the plaintiff (the holder), the maker not having made payment in due course of the amount due within the meaning of S. 82.

The only question that remains is whether the plaintiff has put himself in a position to sue. S. 30 provides that the drawer of bill in case of dishonour by the drawee is bound to compensate the holder provided that due notice of dishonour has been given to, or received by, the drawer. S. 94 provides that this notice must be given within a reasonable time after dishonour. But S. 98 provides for certain cases where no notice of dishonour is necessary. These questions have not been considered by the Lower Appellate Court and if the respondent is to succeed on his footing as a holder, findings must be called for on those issues.

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A further point is taken by the appellant that, under S. 74, a negotiable instrument payable on demand must be presented for payment within a reasonable time after it is received by the holder. This question also has not been considered and a finding would be necessary.

The respondent has, however, sought to support the decree in his favour by the contention that the Lower Appellate Court was wrong in dismissing his suit on the footing of surety, his argument being that the consent of the drawer to the contract of guarantee is not necessary to enable the surety to sue. S. 126 of the Contract Act is as follows:—"A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default.. The person who gives the guarantee is called the 'surety'; the person in respect of whose default the guarantee is given is called the 'principal debtor' and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be either oral or written."

S. 128: "The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract."

S. 140: "Where a guarantee debt has become due, the surety, upon payment is invested with all the rights which the creditor had against the principal debtor."

S. 145: "In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee."

It is argued that the language of S. 126 does not require the principal debtor to be a party, and that therefore even when there is no consent by the principal debtor the surety has all the statutory rights against the principal debtor. Clearly the principal debtor need not be a party to give the creditor his rights against the surety, but the rest of the proposition does not necessarily follow. The language of S. 145 raises a difficulty. The section carries the rights of the surety against the principal debtor a little further than S. 140. The latter section gives the surety the rights of the creditor. S. 145 makes the principal debtor liable "on an implied promise" for any sum above the amount due on the note which he has rightfully paid. Illustration (a) is a case where the surety defends a suit by the creditor,

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having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from the principal debtor the amount paid by him with costs. The importance of this section is that it speaks of an implied promise *in* the contract of guarantee. The statute does not say that every guarantor shall have a right to recover sums rightfully paid, only; but it seems to base that right on the implied promise of indemnity given by the principal debtor. If the section had contained the latter words only there would have been nothing in the Act to require the principal debtor to be a party to the contract, but it seems very difficult to hold that a term can be implied *in* a contract when the party so liable is not necessarily a party and so, if this section is carried to its logical conclusion, it would follow that there must be more than a consent by the principal debtor; he must be a party to the contract between the surety and the creditor to get the full benefit of the section.

It is unfortunate that the Legislature has not used the clear and unambiguous language to be found in the Mercantile Law Amendment Act 19 and 20 vic. c. 97 S. 5 where the right is given to every person, who is surety for "a debt or is liable with another for any debt, to recover from the principal debtor or any co-debtor indemnification for the advances made and loss sustained." The right in this statute is not founded on contract or implied promise. Prior to this Act there were many decisions, some not easily reconcilable, on the rights arising out of suretyship. The learned Vakil for the respondent relies on one *Hodgson* v. *Shaw* [1], as establishing the principal that without consent the surety had no right against the principal debtor The language used is "consent is necessary, for a person cannot make himself a creditor of another by volunteering to discharge his obligations." *Vide* page 191 the judgment of the Lord Chancellor. The same proposition was relied upon in argument *in ex parte Bishop* [2] but was found not necessary for decision. Thesiger Lord Justice referred to the observations of Mr. Justice Willes in *Cook* v. *Lister* [3], and declined to accept it as established; and the Court decided the case on the broad principle that "every one of the Company's bills in circulation impliedly authorised every holder of the bill to indorse it over and thus transfer to the indorsee his rights against the acceptor, and if the indorsee pays the bill,

1. (1834) 3 Mylne and Keen p. 183. 2. (1880) 15 Ch. D. 400.
3. (1863) 13 C.B (N. S.) 543, 594 : 143 E. R. 215.

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he does so under compulsion undertaken by the implied authority of the acceptor." This proposition (substituting the drawer for the acceptor, the bill not having been accepted) is that to be found in the section of the Negotiable Instruments Act above referred to and is in fact the basis of the Subordinate Judge's decision. The result of this proposition is that a surety to a Negotiable Instrument who has become such without the concurrence in the contract of the drawer (or acceptor as in the last case referred to) gets no higher rights than an ordinary holder and if S. 145 is to be construed strictly the same result seems to follow.

I feel convinced that the Legislature did not intend this limitation but that it intended to embody the law to be found in the Mercantile Law Amendment Act and to make no distinction between sureties in a bilateral contract and those in a trilateral contract but I am not prepared to hold that S. 145 can be construed as giving effect to that intention. The plaintiff must therefore fall back on S. 140 where his rights are entirely statutory. This section gives him his suit on the original obligation but subject to the same limitations as affect the creditor. This being so it does become necessary to have findings on the issues above referred to. I would like to add that I see no hardship in a surety being enabled by law to become a creditor without consent of the original debtor. Since the Judicature Act, all choses in action have been transferable without consent of the debtor and even prior to the Act, the Courts of Equity recognised equitable assignments without such consent; (*vide Brandt* v. *Dunlop Rubber & Co.* [1] and the law in this country has followed the English law up to the date of the Amending Act to the Transfer of Property Act, Act II of 1909 which has even gone beyond the English Statutory Law.

[In compliance with the order contained in the above judgment the Temporary Subordinate Judge of Sivaganga returned a finding that the hundi was presented for payment within a reasonable time after it was received by the holder and that due notice of dishonour also was given].

And the Second Appeal coming on for final hearing.

The Court delivered the following

Judgment:—We accept the findings and dismiss the appeal. There is no order as to costs.

1. (1905) A. C. 454.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Kumaraswami Sastri.

Chengalvala Gurraju ... Appellant * in both the 2nd Appeals (Defendant)

v.

Madapathy Venkateswara Row Pantulu Garu ... Respondent in both the 2nd Appeals (Plaintiff).

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Civil Procedure Code, S. 11—Res judicata—*Judgment in connected suits—Appeal against one and no appeal against others—Effect of—Judgment pending appeal or before appeal time expir es—Provisional judgment and not* res judicata—*Judgment on mistaken view of re judicata—No bar.*

A judgment pending appeal c r for which the appeal time has not expired is only a provisional judgment and loes not operate as *res judicata.*

The judgment in one connect ed suit cannot bar the hearing of the appeal from another.

The respondent filed S. S. 46 /09 and S. S. 276/10 against the appellant to enforce acceptance of patta for fasli 1318 and 1319 respectively. The suits were disposed of on 26-3-1912. Appeals were filed against the judgments in the two suits on 17-6-1912. S. S. 412 of 1! 11 which was a suit to enforce acceptance of patta for fasli 1320, came on for earing on 23-5-12. The decision in S. S. 276/10 was held to operate as *res judica a* and judgment was given accordingly. No appea was filed against this judgment. When the appeal against judgments in S. S.276/10 and S. S. 466/09 came on before he District Judge, he held that the decision in S. S. 412 of 1911 not having been appealed against was final and barred the hearing of the appeals. On appeal ag inst the same

Held that the decision in S. . 276/10 could not operate as *res judicata* in S. S. 412/11 as at the time of th disposal of the latter suit, appeal time had not expired for the judgment in S. S. 276/10 and that the judgment in S. S. 412/11 which was not a decision on the nerits but proceeded on a mistaken view of the law of *res judicata* could not bar the disposal of the appeal against S. S. 276/10 on the merits.

Appeals against the ecrees of the District Court of Kistna at Masulipatam in Appe l Suits Nos. 217 and 218 of 1912 respectively preferred agai st the decrees of the Court of the Sub-Collector of Bezwada Divi ion in Summary Suits Nos. 466 of 1909 and 276 of 1910 respective y.

V. Ramesam and *V.* 1 *ama Doss* for Appellant.

A. Krishnaswami Aiy r for Respondent.

The Court delivered the following

Judgment:—The defendant is the appellant. The respondent filed Suits Nos. 466 of 1909 and 276 of 1910 against the appellant to enforce acceptance of pattas for faslis 1318 and 1319.

* S. A. Nos. 1576 and 1577 of 1913. 19th January 1916.

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They were dismissed by the Sub-Collector on the 19th December 1910 on the ground of want of jurisdiction but they were remanded for disposal by the District Court on the 28th November 1911.

The Sub-Collector on remand passed a decree in both suits on the 26th March 1912. The suits were tried together and one judgment covered both the suits. Appeals were filed to the District Court on the 17th January 1912.

While proceedings were pending before the Sub-Collector the respondent (who is the landlord) filed S. S. No. 412 of 1911 to enforce acceptance of the patta tendered for fasli 1320. The Sub-Collector on the 23rd May 1912 passed a decree in favour of the plaintiff on the ground that the decision in S. S. No. 276 of 1910 passed on the 26th March 1912 rendered the contentions raised in the suit *res judicata.* No appeal was filed against the decree in S. S. No. 412 of 1912.

The appeals filed against the decrees of the Sub-Collector in Suits Nos. 466 of 1909 and 276 of 1910 came on for disposal before the District Judge on the 7th December 1912 and he dismissed them on the ground that the decision of the Sub-Collector in S. S. No 412 of 1911 (against which no appeal had been filed) rendered the question raised by the appellant *res judicata.* The present second appeal is against this decision.

When S. S. No. 412 of 1912 was decided, the time allowed by the Limitation Act for preferring appeals against the decision in Suits Nos. 466 of 1909 and 276 of 1910 had not run and it is not disputed that the appeals to the District Judge were filed in time. The only question for determination is whether the decision of another suit between the same parties not on the merits but on the ground that the decisions subsequently appealed against rendered the question *res judicata* would bar the appeals from the prior decisions unless the later decision was also appealed against. There is a conflict between the views taken by Holloway, J. in *Suryanarayanarazu* v. *Chellamkuri Chellamma* [1] and that taken by the Full Bench of the Allahabad High Court in *Balkishan* v. *Kishan Lal* [2]; but while the *dictum* of Holloway, J. was only *obiter* the point arose directly for determination in the later case.

There can be little doubt that an appeal is only a continuation of the original proceedings, the decree passed by the Appellate

1. (1870) 5 M. H. C. R. 176. 2. (1888) I. L. R. 11 A. 148.

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Court being the decree in the suit. (*Gobinda Chander Roy* v. *Guru Churn Kurmokar* 1, *Dinonath Ghose* v. *Shama Bibi* 2, *Settappa Gounden* v. *Muthia Gounden* 3, *Chinnakaruppan Chetti* v. *Meyyappa Chetti* 4, *Krishnamachariar* v. *Mangammal* 5); and that on the filing of an appeal the judgment ceases to be *res judicata* and becomes sub-judice, *Nilvaru* v. *Nilvaru* 6. If the appeals had been filed when S. S. 412 of 1911 came up for trial, the Sub-Collector could not have treated his judgment in the suit as having finally decided the matters in issue between the parties so as to render the provision of S. 11 of the Civil Procedure Code applicable.

In *Suryanarayanarazu* v. *Chellamkuri Chellamma* 7, Mr. Justice Holloway referred to the view taken by the Lower Court that a former judgment would not be conclusive when an appeal is pending and observed as follows:—"In the Lower Court it seems to have been taken for granted that the former judgment could not be conclusive because an appeal was pending. This is not in accordance with English Law as the judgment on the rejoinder in *Doe* v. *Wright* 8 shows. It would, however, be perfectly sound doctrine in the view of other jurists (Unger Ost. Priv. Recht: II 603. Sav. Syst. VI 297. Seq. Waihter II 549). As an Englishman I should be sorry to invite a comparison between the reasons given by these great jurists for their and those embodied in the English cases for the contrary doctrine." These observations were *obiter* as the former judgment against which the appeal was pending had become final when the judgment of the High Court was pronounced and according to Mr. Justice Holloway "the only point to be determined is whether it is conclusive in the present litigation" with reference to the identity of the subject as well as of the object between the two suits. It also appears from the language of Holloway, J. that he thought that the continental jurists were right but that he felt himself bound by the English authorities. The view that a judgment will operate as *res judicata* even when an appeal has been filed is not supported by any subsequent decisions.

In *Doe* v. *Wright* 8, the suit was on trespass and the question was whether the verdict in an action before the King's Bench in

1. (1887) I. L. R. 15 C. 94.
2. (1900) I. L. R. 28 C. 23.
3. (1907) I. L. R. 31 M. 268.
4. (1915) M. W. N. 844.
5. I. L. R. 26 M. 91 at 95.
6. (1881) I. L. R. 6 B. 110.
7. (1870) 5 M. H. C. R. 176
8. (1839) 10 A. & E. 763 s.c. 113 E.R. 289.

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a previous action in respect of which a writ of error was allowed in Chancery would operate as an estoppel in the subsequent suit in the King's Bench. Lord Denman in holding for the plaintiff observed as follows :—"The replications being good by way of estoppel, the remaining question is, whether the rejoinders avail to destroy their effect; and these allege the pendency of a writ or error on the original judgment in the House of Lords, and we are clearly of opinion against the defendant on this point. The authority cited by Mr. Cresswell from the year book 18 Edward 4 f 6 b pl 33 is very direct and satisfactory; and to this and other cases cited at the Bar may be added those of *Taswell* v. *Stone* [1] and *Benwell* v. *Black* [2], because they illustrate the distinction taken between the mere maintenance of the action on a judgment pending a writ of error to reverse it, and the proceedings to execution upon a judgment recovered in such second action; in the former case the Court being clear that there was no reason to set aside the judgment but thinking it highly proper to stay any proceeding to execution upon it."

In *Burnaby* v. *Robert Earle* [3], it was pointed out that at common law the suing out of a writ of error was a *supercede* as of execution on the judgment but did not affect the judgment in any other way and that it was consequently held in *Snook* v. *Mattock* [4] and *Doe* v. *Wright* [5], that the pendency of proceedings in error was no answer to an action on the judgment. It was also pointed out that by virtue of S. 38 of the Common Law Procedure Act of 1854 notice of the appeal does not stay execution of the judgment or affect the judgment in any way unless bail is given within the time limited.

The law in America is thus summarised by Black in his treatise on the Law of Judgments Vol. II p. 510 : "In many of the States it is held that the pendency of an appeal suspends the operation of the judgment in respect of all its usual effects and hence the judgment not becoming final while the appeal remains undetermined it cannot be pleaded in Bar in the interval or used in evidence as an estoppel"........" But in several other States the rule is that although an appeal suspends the operation of the judgment for purposes of execution still so long as it remains un-

1. (1769) 4 Burr. 2151 s.c. 98 E R. 287. 2. (1790) 3 T. R. 643.
3. (1874) L. R. 9 Q. B. cases. 490. 4. (1836) 5 A. & E. 239,
5. (1839) 10 A. & E. 763.

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reversed, its conclusiveness is not affected by the appeal and in the meantime it may be pleaded or produced in evidence as if final." The view he is inclined to take is that the mere fact that a judgment is liable to be appealed from cannot strip it of its conclusive character and that it remains in force as final unless actually suspended by an appeal and will in the meantime operate as *res judicata.*

We do not think that English and American authorities proceeding as they do upon technical rules of practice and procedure relating to appeals throw much light on the determination of questions arising under S. 11 of the Civil Procedure Code. There seems to be considerable difference between a bill for review or of error and an appeal (Hukumchand on *res judicata* page 701). As pointed in *Settappa Gounden* v. *Muthia Gounden* [1], the functions of the Appellate Court are not the same in England and America as in India and consequently great care has to be exercised before decisions based on practice and procedure of a highly technical character are followed in considering questions arising under the Civil Procedure Code. There is nothing in the Code to suggest that stay of execution has anything to do with finality of a judgment under appeal.

A Full Bench of the Allahabad High Court in *Bal Kishen* v. *Kishen Lal* [2], held that a judgment liable to appeal or actually under appeal cannot operate as *res judicata* during the interval preceding the appeal or the interval preceding the decision of the appeal. Mr. Justice Mahmood after referring to the view of Pothier to the effect that judgments liable to appeal stand for the purpose of *res judicata* on the same footing as provisional judgments was of opinion that explanation IV of S.13 of the Civil Procedure Code of 1882 was not inconsistent with the view of Pothier and other continental jurists that judgments liable to appeal are only provisional and not final adjudications. The Chief Justice (Sir John Edge) and Justice Straight concurred in the judgment pronounced by Mr. Justice Mahmood.

Explanation IV to S. 13 of the Civil Procedure Code of 1882 which enacted that a decision liable to appeal may be final within the meaning of the Section until the appeal is made has been omitted in the present Code (of 1908) and the omission (which was in

1. (1907) I. L. R. 31 M. 258.

2. (1888) I. L. R. 11 A 148.

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all probability made in view of the decision in 11 A.148) removes any doubts or difficulties in dealing with the question and it is not necessary to speculate on the class of cases to which this explanation can be applied if a judgment liable to appeal is only held to be provisional and not operative as *res judicata*.

In dealing with S. 52 of the Transfer of Property Act it has been held that a person who purchases property between the date of the disposal of the suit and the filing of the appeal would be bound by the rule of *lis pendens*, *Gobind Chunder Roy* v. *Guru Churn Kurmokar* [1], *Dinonath Ghose* v. *Shama Bibi* [2], *Sukhdeo Prasad* v. *Jamna* [3], *Settappa Gounden* v. *Muthia Gounden* [4]. If the appeal is only a continuation of the original proceedings and the suit is, for the purpose of S. 52 of the Transfer of Property Act, regarded as pending between the date of the decree and that of the filing of an appeal, it is difficult to see why the same rule should not apply when dealing with S. 11 of the Civil Procedure Code. The principle has been extended by Sadasiva Aiyar and Spencer, JJ. to the interval elapsing between the disposal of a claim and the filing of a regular suit under O. 21 R. 53 of the Civil Procedure Code (the Limitation Act allowing a period of one year) *Krishnappa Chetti* v. *Abdul Kadir Sahib* [5].

In *Panchanada Velan* v. *Vaithinatha Sastrial* [6], a Full Bench of this Court held that when cross suits are tried together and an appeal is preferred against only one of the decrees, the judgment in the suit not appealed against did not render the questions at issue *res judicata*. Their Lordships observe as follows:—"It would lead to startling results if we were to hold that an Appellate Tribunal is precluded from dealing with a question which comes before it on appeal because an inferior court upon the same facts but in a case other than the case under appeal had given a decision which had not been appealed against at the same time as the decision in the case under appeal." In *Ramaswami Chetty* v. *Karuppan Chetty* [7], Chief Justice and Mr. Justice Srinivasa Aiyangar held that, where judgments were delivered in respect of two suits, the one being based on and following the other, the fact that the party had not appealed

1. (1887) I. L. R. 15 C. 94.
2. (1900) I. L. R. 28 C. 23.
3. (1900) I. L. R. 23 A. 60.
4. (1907) I. L. R. 31 M. 268.
5. (1913) 26 M. L. J. 449.
6. (1905) I. L. R. 29 M. 333=16 M.L.J. 63.
7. (1915) 29 M. L. J. 551.

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against one of the decrees would not render the questions raised in the decree appealed against *res judicata*. The same principle is applicable to cases when separate judgments are delivered in a number of connected suits. In the present case except the fact that the pattas tendered were for separate faslis the cause of action and the parties are the same, and the principle of the decisions above referred to may well be applied to the facts of the present case.

It has been argued by Mr. Krishnaswami Aiyar for the respondent that, so long as an appeal is not filed, the possibility of filing an appeal and of a reversal cannot affect the present validity of the judgment and that as appeals may be filed even after the period prescribed by the Limitation Act (should the delay be excused) there would be no finality to judgments. There is some force in this argument but, on the other hand, so long as a party is given a right of appeal it would lead to great hardship, if an erroneous judgment operates as *res judicata* during the interval allowed by law between the date of judgment and the filing of an appeal, especially as a party cannot in this country file an appeal at once. As observed in *Settappa Gounden* v. *Muthia Goundan* [1]. "It is not open to a defeated suitor to file an appeal immediately, as he has to obtain copies of decree and judgment and he ought not to suffer for the delay imposed by law. There is no reason why this delay should prejudice him in this respect any more than the delay due to adjournments or stay of proceedings."

It should also be remembered that a later decision not appealed against would be final irrespective of the decision of the Appellate Court and that therefore the finality of the decisions not appealed against is in no way disturbed by what the Appellate Court might do. It is argued that it is the duty of the party to file an appeal against the later decision if he think, that it is wrong and that ought not to operate as *res judicata* but there are cases where no appeal or second appeal is allowed by law. Difficulties will also arise if the party is not in a position to file an appeal against the later decision before the appeals filed against the earlier decisions come on for disposal. As regards appeals filed out of time and after independent rights between the parties

1. (1907) I. L. R. 31 M. 268.

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have ripened, it is unlikely that courts would excuse the delay if during the interval other rights come into existence, which would render it inequitable that questions disposed of should be re-opened at the instance of a party who seeks the indulgence of the court, *Esdaile* v. *Payne* [1].

Following the decision in *Bal Kishen* v. *Kishen Lal* [2], we are of opinion that the Sub-Collector was wrong in holding that the decision passed by him in Suits Nos. 466 of 1909 and 276 of 1910 had the force of *res judicata* during the interval between the date of his decree and the time allowed between the date of his decree and the time allowed by law for filing the appeal.

The erroneous decision in Suit No. 412 of 1911 which was not on the merits but on a mistaken view of the law taken by the Sub-Collector would not therefore render the question raised in the appeals filed against the decrees in Suits Nos. 466 of 1909 and 276 of 1910 *res judicata* because the correctness of the decision in Suit No. 412 of 1911 would not be questioned in the appeals against those decrees. *Mangalathammal* v. *Narayanasami Aiyar* [3] is directly in point. *Panchanada Velan* v. *Vaithinatha Sastrial* [4] and *Rami Chetti* v. *Karuppan Chetti* [5] are also authorities for holding that the District Judge was not debarred from deciding the appeals on their merits simply because no appeal was filed against the decree in the connected suit.

We reverse the decision of the District Judge and remand the appeals for disposal on the merits. The respondents will pay the appellant's costs in this Court and the costs in the Lower Court will abide and follow the result.

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1. (1889) 40 Ch. D. 520 at 533.
2. (1888) I. L. R. 11 A. 148.
3. (1907) I.L R. 30 M. 461 17 M.L.J. 250.
4. (1905) I.L.R. 29 M. 333.
5. (1915) 29 M. L. J. 551.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice, and Mr. Justice Seshagiri Aiyar.

Subbaraya Goundan ... *Appellant** *(8th Defendant)*

v.

S. Ranganatha Mudaliar and others ... *Respondent (Plaintiff and Defendants 1 to 7.)*

Subbaraya Goundan v. Ranganatha Mudaliar.

Jodi payable by Inamdar—Right of Zamindar or Mittadar under his sannad—Extent of—Jodi if a charge on interest of Inamdar—Assignment of jodi as such—Distinction.

A Zamindar or Mittadar, who under his sannad has a right to collect the jodi payable by an Inamdar, has no charge for arrears of such jodi on the interest of the Inamdar.

Per Seshageri Aiyar, J.:—If what is assigned is the *jodi* as such, the assignee would have a first charge although he may not be entitled to have all the statutory remedies which the assignor has.

Appeal against the decree of the District Court of Salem in O. S. No. 20 of 1911.

T. R. Ramachandra Aiyar, T. R. Krishnaswami Aiyar and *N. A. Krishna Aiyar* for Appellant.

S. Srinivasa, Aiyangar, K. V. Krishnasawmy Aiyar, A. Srinivasa Aiyangar, N. C. Vijaya Raghavachariar and *C. S. Venkata Chariar* for Respondents.

The Court delivered the following

The Chief Justice.

Judgments:—*The Chief Justice.*—The question involved in this appeal is whether a Zamindar or Mittadar who under his sannad has a right to collect the jodi payable by an Inamdar, has a charge for arrears of such jodi on the interest of the Inamdar. Before considering this question it may be well to refer to the right of Government to a charge for arrears of revenue, and to the rights of the Inamdar for arrears against the ryots themselves.

It was held by Innes, J. in *Subbaraya* v. *The Sub-Collector of Chingleput* [1] that "the right of the Government is only a right to a charge on the land, and a right to forfeit by due course of law, the title of the person holding the land who does not pay the charge;" and this was cited with approval by Shephard, J. in *Secretary of State* v. *Ashtamurthi* [2]. In the present case the Government assigned its right to revenue to the Inamdar subject to the payment of a jodi, and it is well-settled that by virtue of such assignment the Inamdar did not acquire a charge upon the land, but was left to recover rent from the occupiers under the

* A. S. No. 198 of 1913. 15th December 1915.

1. (1883) I.L.R. 6 M. 303 at p. 310. 2. (1889) I.L.R. 13 M. 89 at p. 128.

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provisions of the Madras Rent Recovery Act of 1865; and it was not until the passing of the Act of 1908 that landholders, including certain Inamdars acquired a statutory charge for rent. As regards the jodi payable by the Inamdar to Government it is, where it has not been assigned, recoverable by Government, like Zamindar's peishcush by sale of the Inamdar's interest under the law in force for the time being, now the Revenue Recovery Act, 1864. Under S. 2 of that Act the land, the buildings upon it, and its products are to be regarded as the security for the public revenue; but provided they have paid the rent to the landholder the ryots are not affected by the landholder's default to pay the revenue, due by him (S. 33) and all that Government can do is to sell the interest of the defaulter free of all incumbrances. The right to sell free of incumbrances in such a case is conferred by S. 42 of the Act.

Coming now to cases where the right to collect the jodi has been transferred to the Zamindar or Mittadar under his sannad, there is a long series of decisions in this court that, when Government transfers the right to collect the jodi to a Zamindar or Mittadar in consideration of his undertaking to pay a fixed peishcush, the Zamindar or Mittadar has no charge upon them and that a suit by him to recover jodi is a suit for rent and nothing more and so cognizable in this Presidency by the Court of Small Causes.

It was apparently so held in S. A. No. 692 of 1893 and though a different view was taken in S. A. No. 822 of 1894, (*vide* footnote in *Vijayanagram Maharajah* v. *Sitaramarazu* [1]), it was again so ruled by Shephard and Subramania Aiyar, JJ. in *Mullapudi Balakrishnayya* v. *Venkatanarasimha Appa Rao* [2], and *Venkatagiri Rajah* v. *Venkata Row* [3]. *Gajapathi Rajah* v. *Suryanarayana* [4] and *Appa Rao* v. *Sobhanadri Rao* [5], are to the same effect; and in *Kasturi Gopala Ayyangar* v. *Anantaram Thivari* [6], it was again laid down broadly that assignees of revenue cannot proceed under S. 42 of the Revenue Recovery, Act. On the principle of *stare decisis* I feel bound to adhere to these decisions. The fact that jodi was held to be rent payable to a landholder by a tenant within the meaning of the Rent Recovery Act, 1865, having regard to the definition of landholder (See *Lakshmi-*

1. (1895) I. L. R. 19 M. 100, 103.
2. (1896) I. L. R. 19 M. 329.
3. (1897) I. L. R. 21 M. 243.
4. (1898) I. L. R. 22 M. 11.
5. (1900) I. L. R. 24 M 158.
6. (1902) I. L. R. 26. M. 730, 733.

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narayana Pantulu v. *Venkatanarayanam*[1], and the cases there cited), and that similar provisions were to be found in the Madras Estates Land Act 1908, until these provisions were themselves repealed by the Amending Act of 1903, has no direct bearing on the question but makes it more than ever undesirable to question the authority of the decisions laying down the competency of the Small Cause Courts to try suits for jodi on which the Legislature may have acted in finally deciding to leave such suits to the Civil Courts. The earlier cases of *Suryanna* v. *Durgi*[2], *Alubi* v. *Kunhi Bi*[3] and *Krishnasami* v. *Venkatarama*[4] were not cases of jodi, but assignments of portions of the revenue payable directly by the ryot and in the last of these cases Shephard, J., who was a party to some of the later decisions doubted if a mere assignment of revenue would convey a charge. In *Ramachandra* v. *Jaganmohana*[5] the point did not arise. These decisions in my opinion afford no sufficient ground for questioning the numerous subsequent decisions expressly in point. If the law there laid down is to be altered it should, I think, be by legislature. We must reverse the decree in so far as it affects the 8th defendant and allow his appeal with costs throughout. The memorandum of objections by the 7th defendant is dismissed with costs. As regards the defendants 2 to 6 the decree is varied so as to make it a decree against the joint family property in their hands under O. 41, R. 33 of the Code of Civil Procedure.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.:—It is not without hesitation that I have come to the conclusion that the appeal should be allowed.

The first question is whether the jodi due from the Inamdar is a charge upon the land. I understood Mr. Ramachandra Aiyar to concede that if it is directly payable to Government, it would be a first charge. Apart from this admission, I am of opinion that there is a first charge for the jodi. It was pointed out in *Secretary of State for India* v. *Bombay Landing and Shipping Co.*[6] that by the common law of this country, the debt due to the King took priority over other debts, with the possible exception of those due to Brahmins. The view was accepted in some of the early Bengal Regulations, See *Judah* v. *Secretary of State for India*[7]. At the time of the permanent settlement, it was recognised in Madras.

1. (1897) I.L.R. 21 M. 116, 119, 8 M.L.J. 43 (F.B.)
2. (1883) I.L.R., 7 M. 258.
3. (1886) I. L. R. 10 M. 115.
4. (1890) I.L.R., 13 M. 319.
5. (1891) I. L. R. 15 M. 161.
6. (1868) 5 B. H. C. R. 23.
7. (1886) I. L. R. 12 C. 445, 452.

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Seshagiri Aiyar, J.

vide S. 6 of Regulation 27 of 1802. In the Revenue Recovery Act of 1864, there is an express provision to that effect. I am satisfied that the jodi payable by Inamdars is within the purview of that Act.

Mr. Ramachandra Aiyar strongly relied upon some of the decisions of this Court which have held that a claim for *kattubadi* or jodi is cognizable by the Court of Small Causes. They are all cases in which the payments were due to the Zamindar as part of his income. The term jodi or quit rent is applied indiscriminately to what is recoverable by a proprietor from his undertenure-holders as well as to payments due to Government by way of assessment. None of the cases, so far as I have examined them, related to jodi payable to Government. Further these decisions proceed on the construction of the terms 'Landholder and tenant' in Act VIII of 1865. The Estates Land Act is different. Even under the old Act, the decisions were not uniform. See *Alubi* v. *Kunhi Bi*[1] *Vijiyanagaram Maharajah* v. *Sitaramraju*[2] (the case in the footnote). It is true that a larger number of cases have taken a different view, *Vijiyanagaram Maharajah* v. *Sitaramraju* [2] *Mullapudi Balakrishnayya* v. *Venkata Narasimha Appa Rao* [3] *Gajapathi Raja* v. *Suryanarayana* [4], *Lingam Krishna Bhupathi Deva* v. *Vikrama Deva* [5] and *Appa Rao* v. *Sobhanadr Rao* [6]. Mr. Justice Subramaenia Aiyar has explained in *Lakshminarayana Pantulu* v. *Venkatrayanam* [7] the reason of this change. Although on the principle of *stare decisis* it is undesirable to upset this course of decisions, I am not prepared to extend them to cases in which the jodi is payableto Government.

The next point for consideration is whether the plaintiff can stand in the shoes of the Government and claim a first charge. If the right to collect the jodi was assigned to him as such, I would be prepared to hold that he has a first charge. I accept Mr. Srinivasa Aiyangar's contention that an assignee of Government Revenue is entitled to the security which the Government had, although he may not have all the statutory remedies which the assignor had. The principle of S. 141 of the Indian Contract Act is applicable to such assignment. North, J. in *In re Lord Churchill : Manisty* v. *Churchill* [8] says that the priority which the

1. (1886) I. L. R. 10 M. 115.
2. (1895) I. L. R. 19 M. 103.
3. (1896) I. L. R. 19 M. 329.
4. (1898) I. L. R 22 M. 11.
5. (1900) 10 M. L. J. 256.
6. (1900) I. L. R. 24 M. 158.
7. (1897) I. L. R. 21 M. 116.
8. (1888) 39 Ch. D. 174.

Crown has enures for the benefit of the surety. This is the view taken in *Suryanna* v. *Durji* [1] and *Krishnaswami* v. *Venkatarama* [2]. In *Gopala Aiyangar* v. *Anantaram Thivari*[3] the learned Judges say that if the tax-payer was in a position to be proceeded against by the Government, the assessment will be a charge. I understand that decision to lay down that so long as the distinctive character of Government assessment remains, whoever may be the person that collects it, he will have a first charge. If it lays down that under no circumstances can an assessment which is collected by an assignee create a charge, I respectfully dissent from that view.

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Seshagiri Aiyar, J.

The difficulty in this case arises in finding out whether the *jodi as such* was assigned to the plaintiff's predecessor-in-title. The sannad is not produced. We are not in a position to say whether in the Permanent Settlement a distinction was made between the right to collect the jodi and the right to collect from tenants. It cannot be said that the jodi was not included in the assets on which the peishcush was fixed. One circumstance on which Mr. Ramachandra Aiyar laid stress has influenced my finding on the point. From Exs. G and H, it appears that the Government decided to claim the entire jodi as the Mittadar had been given waste lands in other villages to which he was not entitled. It was argued by the learned Vakil for the Appellant that the income from these waste lands was taken into account in including the whole of the jodigai peishcush. I think there is force in the argument. If this is the correct view, the Government did not assign the *jodigai as such*; and therefore the Mittadar cannot claim a first charge. This state of affairs can only be rectified by Government.

I agree in the order proposed by my Lord.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

The Rajah of Kalahasti ... *Appellant* * (*Petitioner-Defendant*)

v.

Sree Mahant Prayag Dossjee Varu ... *Respondent* (*Ctr. Pet. Plff.*)

Civil Procedure Code S. 52—Legal representative—Duty to account for assets—Burden of proof—Profits also to be accounted for—Attached property—Non-existent right—Duty of Court—Transfer of Property Act S. 101—Merger—Mortgagee becoming entitled to equity of redemption—No puisne incumbrance.

Rajah of Kalahasti v. Sree Mahant Prayag Dossjee Varu.

* A. A. O. No. 86 of 1915. 2nd February 1916.

1. (1883) I. L. R. 7 M. 258. 2 (1890) I. L.R. 13 M. 319.

3 (1902) I. L. R. 26 M. 750.

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The liability of a legal representative under S. 52 C. P. C. is not discharged until he accounts not only for the property that has come into his possession but also for the profits from the same.

Once it is proved or admitted that the legal representative sought to be made liable has come into possession of assets belonging to the estate of the deceased, it is for him to satisfy the court as to the extent of the assets received and to account for them.

Where a mortgagee becomes by inheritance entitled also to the equity of redemption, a merger will take place, unless there are *puisne* incumbrancers against whom he has to be protected.

Per Sadasiva Aiyar, J.—*Quaere* : Whether a court is bound to sell attached property though the right attached ceased to exist long before attachment and is not entitled to stop the sale altogether.

Appeal against the order of the District Court of North Arcot dated the 2nd February 1915 in C. M. P. No. 765 of 1914 in E. P. No. 42 of 1914 (O. S. No. 40 of 1910).

[The facts are fully stated in the Judgment.]

L. A. Govindaraghava Aiyar (*A. Ramachandra Aiyar* with him) for Appellant:—S. 101 of the Transfer of Property Act governs the present case. It is, as pointed out by the court below, to the interest of the Raja to keep his mortgage alive. The two interests claimed by the Raja are not of the same character. One is private property at the absolute disposal of the Raja, the other is impartible estate governed by the Madras Impartible Estates Act. The doctrine of merger cannot apply to such a case, because, (1) the present Raja is not absolutely entitled to the inheritance, while he is so entitled to the mortgage right and (2) the present Raja has signified his intent to keep the mortgage interest alive; further, to do so is to his benefit. *Swinfen* v. *Swinfen* [1], shows that the intention may be manifested until the death of the person entitled to both the estate and the charge. But manifestation of intention even is not necessary. It is enough if keeping alive is to the interest of the mortgagee. See Pomeroy on equity jurisprudence (1905 Edn.) Vol. 2, Ss. 789, 797 states the exception to the rule. *Forbes* v. *Moffatt* [2], and *Davis* v. *Barrett* [3] show that (1) there is not necessarily a merger by reason of the estate subject to a charge becoming vested subsequently in the charge-holder and (2) the intention to keep the charge alive can be manifested till the death of the charge-holder.

Sadasivaiyar, J:—These cases are not authority for the 2nd position. They only lay down that acts done by the charge-

1. (1860) 29 Beav. 199=54 E.R. 603. 2. (1811) 18 Ves. 384=34 E.R. 362 (364).
3. (1851) 14 Beav. 542=51 E.R. 394.

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holder up to the date of his death can be considered as evidence of his intention.

Hatch v. *Skelton* [1], *Jameson* v. *Stein* [2] and, *Whiteley* v. *Delaney* [3], state that the principle laid down by Sir W. Grant in *Forbes* v. *Moffatt* [4], is the true principle of the doctrine of merger.

The Indian cases on the point are *Mohesh Lal* v. *Mohant Bawandas* [5], *Gokaldas Gopal Das* v. *Puranmal* [6], *Dinobundhu Shaw choudhury* v. *Jogmaya Dasi* [7], *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* [8] and *Shanker Venkatesh* v. *Sadhashiv Mahadaji* [9]. The other point decided against me by the court below is that the present Raja has not accounted for the income of the estate got by him during the period of his possession thereof. The court below is wrong in thinking that the Raja is bound to account for the income. The order of the court below is presumably under S. 52 of the Code Under that section the legal representative is liable only to the extent of the property of the deceased which has come into the hands of the legal representative. It cannot be said that income of the estate got after the death of the last Raja is "assets" in the hands of the present Raja, although the estate in the hands of the present Raja is estate of the deceased in his hands. The court below has applied the analogy of a widow's estate. According to the decided cases the obligation on the widow is only to keep down interest on the debts by utilising the income got by her for payment of interest. Those cases are no authority for the view that in execution it is open to a creditor to insist upon income being proceeded against for payment of his debts. *Rani Kanno Dai* v. *Lacy* [10], is a case in point and is in my favour. It lays downthat rent accrued due after the death of a Hindu is not assets in the hands of his widow so as to be liable for payment of his debts. The Raja is not a trustee in respect of the income of the estate. He holds the estate in his own right, although the same is liable in his hands for the debts of the last holder. Therefore the Raja is not bound to account for the income. 25 I. C. 384 also shows that the heir is

1 (1855) 20 Beav. 453=52 E. R. 678. 2. (1855) 21 Beav. 35=52 E. R. 759.
3. (1914) A. C. 183 (144) 4. (1811) 18 Ves. 884=34 E. R. 362 (364)
5. (1883) I. L. R. 9 C. 961 P. C. 6. (1884) I. L. R. 10 C. 1035 P. C.
7. (1901) I. L. R. 29 C. 154 P. C. 8. (1912) I. L. R 39 C. 527 P. C.
9. (1913) I. L. R. 38 B. 24. 10 (1897) I. L. R. 19 A. 235.

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not in a fiduciary position with regard to creditors. See also *Richardson* v. *Horton* [1], *Veera Sokkraju* v. *Papiah* [2] and *Haji Saboo* v. *Ally Mahomed* [3]. The cases with reference to widows do not treat the income derived by her as part of the assets of her husband in her hands. They proceed upon the peculiar incidents of a widow's estate. See also *Indu Narain Misser* v. *Krishto Chunder Mahto* [4]. Lastly, the rights of a decree-holder are confined to the rights conferred upon him by the decree, although under the law he may be entitled to other rights.

The Ag. Advocate-General (*S. Gopalaswami Aiyangar* with him) for the Respondent.

I will take the second point first. An impartible estate is assets in the hands of the successor and the income of the estate is also assets in his hands within the meaning of S. 52 of the Code: *In re Hyatt*: *Bowles* v. *Hyatt* [5], lays down the principle applicable to such cases. Rents and profits accruing from assets are also assets, being assets by accretion. See also *Asseemoonnissa* v. *Ameeroonnissa Khatoon.* [6], which lays down that the representative of the judgment-debtor is liable to the extent not only of property of the deceased in his hand but also of the mesne profits of such property. The decision in *Rani Kanno Dai* v. *Lacy* [7], is justifiable on the facts of that case. If it is taken to go further, it is not sound law. The observations with regard to the rents and profits in the hands of the widow are not sound. When a decree is obtained for a debt due by the holder of an estate it can be executed against the whole estate in the hands of his successor including rents and profits derived from the estate after the death of the debtor. There is no case cited on the other side for the position that a widow or any other person succeeding to the estate of another is not bound to apply the income of the estate got by her or him to the payment of his debt if the corpus is insufficient for the purpose. The case of the holder of an Impartible estate is even on a better footing with regard to the rights of a creditor than the case of a Hindu widow for it has been held that the whole of the estate is assets in the hands of the successor.

1. (1843) 49 E. R. 1006, 1010.
2. (1902) I. L. R. 26 M. 792.
3. (1904) I. L. R. 30 B. 270=6 B. L. R. 1135.
4. 14 W. R. 362.
5. (1888) 38 Ch. D. 609, 621.
6. 15 Suth. W R 285.
7. (1897) I. L. R. 19 A. 235.

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See *Rajah of Kalahasti* v. *Achigadu* [1], *Zamindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati Devastanam* [2]. The onus of proof where receipt of assets is admitted is on the legal representative. *Goverdhan Doss* v. *Krishna Doss* [3], *Magalomi Gurudiah* v. *Narayana Rungiah* [4].

K. Rajah Iyer for the Advocate-General continued.

Then with regard to the question of merger:—The case is one in which a creditor becomes heir to the debtor and there is a confusion of rights. The principle laid down in *Hossainara Begam* v. *Rahimannessa Begam* [6], applies to the case. The hand to pay and the hand to receive has become the same.

Sadasiva Aiyar, J:—Does the Raja succeed as full heir in this case?

Yes; he does. The test is to see whether there is a remainder man. Under the Impartible Estates Act, the holder of the estate is in the same position as the manager of a joint Hindu family. He is the absolute owner subject to the limitation imposed upon him by S. 4 of the Act.

Sadasiva Aiyar, J.:—Suppose a sonless Hindu gives to his wife a charge on his estate for Rs. 5,000 and dies subsequently and his wife succeeds to his estate as a Hindu widow. Is there a merger?

Yes; the widow takes the inheritance subject to the burden. Her rights cannot be exercised in such a case unless the case comes within S. 101 of the Transfer of Property Act *i.e.*, there are mesne incumbrances.

Sadasiva Aiyar, J.:—Or, take the case where a Hindu son who has a charge over the self-acquisitions of his father dies subsequently leaving his self-acquisitions and simple creditors. Is the charge in favour of the son extinguished if he succeeds to the self-acquistion of his father after his death?

Yes. S. 101 of the Transfer of Property Act is inapplicable to a case like the present. That section and the cases cited on the other side all contemplate cases where there is a question of mesne incumbrances. The doctrine of merger applies to cases where there are no intervening incumbrances.

1. (1905) I. L. R. 30 M. 454.
2. (1908) I. L. R. 32 M. 429.
3. (1911) 21 M. L. J. 10.6.
4. (1881) I. L. R. 3 M. 359.
5. (1910) I. L. R. 38 C 342 (347).

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Bhawani Kuwar v. *Mathura Prasad Singh* [1] *Arumugasundara Maharaja Pillai* v. *Narasimha Aiyar*[2] and *Laxman Ganesh Rajendra* v. *Mathurabai Narain Govind*[3] lay down that unless there are mesne incumbrances or interests connected with mortgage transactions, the charge-holder cannot use the charge as a shield. The doctrine of presumed intention against merger is not available against simple creditors. The case in *Jugal Kishore* v. *Ram Narain* [4] expressly decides that the material point of time when the intention must be manifested is the time when there is a merger. And if at that time there was no outstanding interest connected with the mortgage transaction, there is *ipso facto* merger.

A. Ramachandra Aiyar in reply:—S. 52 and 50 of the Code do not use the word "assets". They use only the word "property". Therefore the liability of the legal representative is only to the extent of the property which belonged to the deceased and not also of subsequent accretions. *Veerasokkaraju* v. *Papiah* [5] expressly decides that point.

Sadasiva Aiyar, J.:—" Property which has come into his hands" in the judgment means property of the deceased in his hands up to the time of payment by the legal representative *i.e.*, including income accrued due till then.

See also *Richardson* v. *Harton* [6] and *In re Hedgley: Small* v. *Hedgley* [7] The case reported in *Asseemoonnissa* v. *Ameeroonnissa* [8] quoted on the other side is distinguishable because (1) the character of the legal representative is not clear from the report, *viz*, whether he was an executor or an heir and (2) under the old law attachment created an interest in immovable property although under the present law it creates no such interest. In the 38 Ch. Div. case the person was appointed an administrator and as such was liable to account for all that he received.

[*Sadasiva Aiyar, J.*:—Why should an heir be on a different footing from an administrator so far as his duty to discharge the debts of the deceased from his assets is concerned?]

Because (1) an administrator is not entitled to a beneficial interest and (2) he is not bound to take up the adminis-

1. (1912) I. L. R. 40 C. 89 at 102, 104 (P. C.)
2. (1915) 29 M. L. J. 583 at 588, 594.
3. (1913) I. L. R. 38 B. 369.
4. (1912) I. L. R. 34 A. 268.
5. (1902) I. L. R. 26 M. 792.
6. (1843) 7 Beav. 112=49 E. R. 1006 (1010).
7. (1886) 34 Ch. D. 379 (384, 385).
8. 15 Suth. W. R.

tration while an heir has no such option. The case of *Earl of Clarendon* v. *Barham* [1] is a case in point on both questions.—See p. 1079 and 1080. If the previous Raja had not died the creditor could not have called upon him to account for rents and profits got by him. Does the fact of his death place the creditor in a better position so as to give him an interest in the rents and profits. Even if a trespasser had trespassed upon the estate, he would have been held liable only for 3 years' mesne profits, while, in the case of the Raja succeeding, he will, according to the view contended for by the other side, be liable for profits got by him since the date of his accession to the Raj. On the question of merger, see *Dinabundo Shaw Chowdhury* v. *Jogmaya Dasi* [2]. The case in 40 Cal. 89 is distinguishable. The case in 38 C. is not against me.

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The Court delivered the following

Moore, J.

Judgments :—*Moore, J.*—The respondent, the Mahant of Tirupati, obtained a mortgage decree in O. S. No. 40 of 1910 in the District Court, North Arcot, on the 23rd day of February 1911 against the appellant the Rajah of Kalahasti as the legal representative of the late Rajah Akkappa Nayanim Varu by whom the mortgage has been executed. The appellant, it may be mentioned, succeeded to the estate in May 1905. The mortgaged property having been exhausted, a personal decree for nearly three lakhs of rupees was passed against the appellant on the 7th day of April 1914. It appears that on the 14th day of July 1896 the then Rajah had executed a simple mortgage for one lakh of rupees in respect of certain villages in favour of the appellant for arrears of maintenance and other debts due to the latter. The respondent decree-holder applied in Execution Petition No. 42 of 1914 to attach the mortgage right possessed by the appellant, the judgment-debtor under the mortgage dated the 14th day of July 1896, alleging that the judgment-debtor had not properly applied the assets of the late Rajah which had come to his hands. The appellant then put in a petition asking for the release from attachment of the mortgage right on the ground that the decree having been obtained against him on a mortgage bond executed by his predecessor in title, the decree-holder could not attach a debt due to him, the appellant, in his private capacity. He further stated

1. (1842) 7 and C C C 688=62 E. R. 1073.
2. (1901) I. L. R. 29 C. 154, 155.

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that he had sold the equity of redemption of the properties on the 15th day of February 1913.

The District Judge found that the appellant had appropriated to his own use large sums which ought to have been applied in paying off charges on the estate, and that he was therefore personally liable for at least the amount of the mortgage which had been attached, and dismissed the petition.

The questions for determination in this appeal are (1) whether it is competent to the decree-holder to attach the mortgage right which is said to be the private property of the appellant and (2) whether upon the appellant succeeding to the Kalahasti Estate the mortgage right in his favour becomes extinguished.

It cannot be doubted that the property of the deceased Rajah must be regarded as assets in the hands of his legal representative for the purpose of S. 50 of the Civil Procedure Code. See *Rajah of Kalahasti* v. *Achigadu* [1] which was followed in *Zemindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, etc. Devastanams* [2]. S. 52 of the Civil Procedure Code provides that where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of such property. (2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed to satisfy the Court in the same manner as if the decree has been against him personally.

The judgment-debtor had only to account up to the full value of the assets he received as legal representative. It is for the decree-holder in the first instance to prove that some assets came to the legal representative, and the *onus* is then shifted on the latter to show how the assets were applied.

Once it is admitted or proved that the legal representative sought to be made liable has come into possession of assets belonging to the estate of the deceased, it is for him to satisfy the court as to the extent of the assets received and to account for

1. (1905) I. L. R. 30 M. 454   2. (1908) I. L. R. 32 M. 429.

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them, *Goverdhan Doss* v. *Krishna Doss* [1]. The District Judge finds (and this is in fact not disputed) that the appellant has failed to pay even the interest due under the mortgage decree, and further that he has also appropriated large sums which ought to have been applied in paying off charges on the estate.

The argument adduced on behalf of the appellant was that the income of the Zemindari cannot be regarded as property of the deceased which came into the hands of the present Rajah, that his liability is confined to the extent of the property which came into his hands, and that he is not bound to pay the debts of the late Rajah out of the income of the estate. In *Asseemoonnissa* v. *Ammeroonnissa Khatoon* [2] it was held that where a person is proceeded against as the representative of a deceased judgment-debtor and it is proved that property which belonged to the deceased judgment-debtor has come into his hands, it lies upon the person against whom execution is sought, to account for all the property of the deceased judgment-debtor, which has come into his hands, and that in so accounting, mesne profits whether accruing in the shape of rent or interest must be brought into account. I agree with that decision, and think that the rents and profits received are assets just as much as the real estate. See *In re Hyatt*: *Bowles* v. *Hyatt* [3]. The learned Vakil for the appellant relies in support of his contentions on the rulings in *Rani Kanno Dai* v. *B. J. Lacy* [4], and *Veerasokka Raju* v. *Papiah* [5]. The 26 Madras case is clearly not in point, as payments, had been made by the legal representative to the extent of the full value of the property which had come into his hands and it was consequently held that a decree could not be executed even though he might still have in his possession property which had originally belonged to the deceased. *Rani Kanno Dai* v. *B. J. Lacy* [4] may be distinguished on the ground that the decree-holder had agreed for consideration not to execute his decree against the movable property of the widow.

I am of opinion that the District Judge was right in holding that the appellant having failed to satisfy the Court that he had duly applied the property of the deceased was personally liable to the extent of the property in respect of which he had failed so to satisfy the Court. It remains to consider

1. (1911) 21 M. L. J, 1096. 2. 15 W. R. 285.
3. (1888) 38 Ch. D. 609. 4. (1897) I. L. R. 19 A. 235.
5. (1901) I. L. R. 26 M. 792.

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the question (which was not raised in the Lower Court) whether the mortgage right possessed by the appellant under the mortgage of 1896 became extinguished when he succeeded to the estate and became the owner of the equity of redemption. It is argued on behalf of the appellant that the doctrine of merger does not apply, the appellant being only a qualified owner, and that the appellant has by his conduct signified his intention of keeping the mortgage alike for his benefit. I do not think it necessary to refer to the various English cases cited by Mr. Govindaraghava Iyer. Courts in India are governed by the statutory provision contained in S. 101 of the Transfer of Property Act which is as follows: "Where the owner of a charge or other incumbrance on immovable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit."

The Advocate-General contends that the section presupposes the existence of puisne incumbrances and that the appellant cannot reserve in his favour his own mortgage which had become extinguished when he acquired the equity of redemption. I think that this contention must be upheld. The earlier part of the section states the doctrine of merger. An extinguishment of the debt will ordinarily take place, where the mortgagee becomes also absolute owner of the equity of redemption, for then the equitable estate becomes merged in the legal. The effect of the proviso to the section which states the exception to the rule of merger is (1) to enable the person in whom the two titles are united to keep the incumbrance alive and (2) to declare that the incumbrance should continue to subsist, where the result would be for his benefit. Ordinarily the only object and advantage of keeping incumbrances alive, is that it may be used against the holder of a subsequent incumbrance.

Reference may be made to a recent case *Arumuga Sundara Maharaja Pillai* v. *Narasimha Aiyar* [1] where the learned Chief Justice held that where there are no mesne incumbrances outstanding on the date of the purchase of the equity of redemption by the mortgagee there is merger under S. 101 of the Transfer of Property Act. Mr. Justice Seshagiri Aiyar put the matter

1 (1915) 29 M. L. J. 583.

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very clearly at page 594 of the report where the learned Judge says "It is clear that the section (*i.e.* S. 101) contemplates the existence of puisne incumbrances. Unless that be the object the clause relating to the subsistence of the incumbrance being for the benefit of the purchaser can have no meaning. The person who becomes absolutely entitled to the property cannot reserve in his favour and as against himself his own mortgage. As I read the section it leaves untouched the general rule of law that when a mortgagee purchases the equity of redemption the incumbrance in his favour is extinguished. It only enacts that where there are other mortgages on the property the intention will be imputed to the mortgagee purchaser that he intended to keep alive his own mortgage as a protection against subsequent claimants. The discussion in the House of Lords in the case already referred to shows that the rule enabling the purchaser to fall back on his mortgage is an infringement of legal rights. Consequently a strict construction should be placed on this provision of law. I am of opinion that the mortgagee purchaser can use his previous mortgage only as a shield if there are mesne incumbrances, and that also only in respect of the properties which are covered by such incumbrances." I respectfully agree with the above observations.

The observation of their Lordships of the Privy Council in *Bhawani Kunwar* v. *Mathura Prasad Singh* [1] shows that where there are no incumbrances there is an extinguishment of the right under the mortgage when the equity of redemption is acquired.

The decision in *Laxman Ganesh Rajendra* v. *Muthurabai Narayan Gobind* [2] is to the same effect.

In the result the appeal is dismissed with costs.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J.—I entirely agree with the judgment just now pronounced by my learned brother. The doctrine that a widow could, by her conduct, treat the savings out of the income of her husband's estate as her separate property and that then it would become property at her absolute disposal so that her alienations thereof could not be questioned by her husband's reversioners, cannot be extended so as to give her the right to treat all the income as her absolute property not available to her husband's creditors. There are, no doubt, observations in *Rani Kanno Dai* v. *B. Lacy* [3] which seem to go to the length that the rents of

1. (1912) I. L. R. 40 C. 89 at 104: M. L. J. 311.
2. (1913) I. L. R. 38 B. 369.
3. (1897) I. L. R. 19 A. 235.

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the husband's estate could not be treated in law as assets of her husband for any purpose but I respectfully dissent from those remarks.

On the ground of merger, I would hold that the appellant was not entitled to treat himself as owner of a mortgage right in lands belonging to the Zamindari of which he became the sole owner, though certain restrictions have been placed by the Impartible Estates Act on the extent of his power of alienation. His claim for the release of a non-existent mortgage right was therefore rightly dismissed. As this non-existent right has not yet been sold in execution, it is a matter for consideration for the District Court whether under Order 21 Rule 66 cl (*e*), it ought not to notify in the same proclamation that the attached property is a right which had ceased to exist long ago, assuming that the court is bound to bring it to sale at the instance of the decree-holder and is not entitled under S. 151 of the Civil Procedure Code to stop the sale altogether on that account.

IN THE HIGH COURT OF JUDICATURE AT MADRAS. [FULL BENCH.]

Present:—Sir John Wallis, Chief Justice, Mr. Justice Sadasiva Aiyar and Mr. Justice Srinivasa Aiyangar.

Dhupati Srinvasacharlu ... *Appellant* (1st Defendant)*

v.

A. Perindevamma and others ... *Respondents (Plaintiff and Defendants 2 to 5, 8 & 9.)*

Srinivasacharlu v. Perindevamma.

Court Fees Act S. 7 Cl. (iv)—Suit for accounts—Preliminary decree—Appeal by defendant against whole decree—Valuation

In a suit coming under S. 7 cl (iv) of the Court Fees Act, when the plaintiff has valued the relief prayed for and obtained a decree, in this instance a preliminary decree for an account, and the defendant appeals against the whole decree, the latter is bound by the valuation in the plaint.

Samiya Mavali v. *Minammal.*[1] approved.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Nellore in Original Suit No. 4 of 1912.

This Appeal coming on for hearing on Friday, the ninteenth day of March 1915, the Court (Wallis, C. J. and Tyabji, J.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

The question has been raised in this appeal, whether in a suit coming under Clause IV of S. 7 of the Court Fees Act, when the

* A. No. 82 of 1913. 3rd August 1915.

1. (1899) I. L. R. 23 M. 490 : 10 M. L. J. 240.

Srinivasacharlu v. Perindevi amma.

plaintiff has valued the relief prayed for and obtained a decree, in this instance a preliminary decree for an account, and the defendant appeals against the whole decree, he is bound by the valuation in the plaint as held in *Samiya Mavali* v. *Minammal* [1] or is at liberty to make a fresh valuation for the purposes of the appeal. As we feel some doubt about the correctness of the decision and it is desirable that there should be an authoritative ruling on the point, we have decided to refer the above question to a Full Bench.

T. V. Venkatarama Aiyar for *Appellants.*

In a suit coming under S. 7 cl. (4), the stamp value fixed by the plaintiff in the First Court is binding on the defendant who appeals from the whole decree. S. 6 puts in force Sch. I., where the memorandum of appeal is valued according to the subject-matter of appeal. S. 7 deals with the method of valuation of suits. It deals primarily with plaints. Except in Sub-S. (4), there is no reference to a memo. of appeal. In all cases except those coming under Sub-S. (4) of S. 7 the fee payable on appeal is the same as that payable on the plaint, if the appeal is from the whole decree. In all suit except those covered by S. 7, Sub-S. (4) the subject-matter is capable of valuation. Sub. S. (4) deals with artificial valuation and refers to a plaint or memorandum of appeal. It is only in cases where the artificial valuation fixed by the plaintiff is manifestly inapplicable (*e. g.*, where the appeal is only from a portion of the decree). There has to be a fresh artificial valuation on appeal. But where the appeal is from the whole of the decree, the artificial valuation put by the plaintiff is conclusive. The subject-matter being the same, the valuation in the plaint determines the valuation on appeal. S. 7 (4) makes the plaintiff's valuation final. If the plaintiff exaggerates his claim he is mulcted in costs and Court fees Reference was made to *Bhola Nath* v. *Parsotam Das* [1], *Mohamed Masik* v. *Malkai Mukhadri* [2], *Bunwari Lal* v. *Daya Sanker Misser* [3]; *Valambal Ammal* v. *Vythilinga Mudaliar* [4]. *Samiya Mavali* v. *Minammal* [5], has been uniformly followed in Madras.

K. Bhashyam, Aiyangar—for Respondents.

The Court Fees Act being a fiscal enactment should receive a strict construction. S. 7, Cl. (4) gives me a right to value the

1. (1910) I. L. R. 33 A. 517.
2. ((1883 I. L. R. 10 C. 330.
3. (1907) 13 C. W. N. 815 at 820.
4. (1900) I. L. R. 24 M. 331.
5. (1899) I. L. R. 23 M. 490=10 M. L. J. 240.

Srinivasacharlu v. Perindevamma.

memorandum of appeal. The valuation in appeal may be different from the valuation in the suit, for it is the subject-matter of the dispute in appeal that has to determine the valuation. Here it is an appeal from a preliminary decree for accounts. The relief claimed is to get rid of the liability to account and is different from the relief claimed in the plaint. In such a case S. 7, Sub-S. (4) gives me a right to value the appeal as I please.

[*Srinivasa Aiyangar, J.*—The appeal is from the whole decree and you should accept the plaintiff's valuation.]

I can value the appeal according to the reliefs I ask for. *Ramakrishna Reddi* v. *Kotta Kota Reddi* [1], *Reference under Court Fees Act* [2].

The Court expressed the following

Opinion:—The decision in *Samiya Mavali* v. *Minammal* [3] has been consistently acted on and is in accordance with the decision in *Delroos Banoo Begum* v. *Nawab Syud Ashgur Ally Khan* [4] and *Bunwari Lal* v. *Daya Sunker Misser* [5].

We are not prepared to differ from it, and are of opinion accordingly that the appellant is bound by the valuation in the plaint.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice, Mr. Justice Seshagiri Aiyar, and Mr. Justice Kumaraswami Sastri.

Ayyakutti Mankondan ... *Appellant* * (*Plaintiff*)

v.

Periasawmi Koundan and others ... *Respondents* (*Defendants*).

Ayyakutti Mankondan v. Periasawmi Koundan.

Registration Act Ss. 17 and 49—Partition—List of immovable properties allotted with declaration as to division—Compulsorily registrable Admissibility in evidence —Limitation Act, Art, 11—Civil Procedure Code, O. 21 R 103—No inquiry, no order —Symbolical delivery—Effect of.

Where a document signed by all the members of a Hindu family after mentioning the properties put into the possession of each of them wound up saying "in the presence of the witnesses hereunder we divide."

Held, that the document was inadmissible for want of registration and could not be used even for the purpose of proving division of status.

Where a purchaser in execution of the interest of one of the members of a Hindu family whom he alleged to be divided in interest was resisted by the other members of the family claiming to be in possession and the Court without deciding whether the family was or was not divided directed that the property should be delivered symbolically.

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* L. P. A. No. 160 of 1913. 15th October, 1918

1. (1906) I. L. R. 30 M. 96.
2. (1905) I.L.R. 29 M. 367.
3. (1899) I L R. 23 M. 490.
4. (1879) 15 B. L. R. 173.
5. (1909) 13 C. W. N. 815.

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Held, Per Spencer, J.—That the purchaser was not bound to set aside the order in one year.

Per Sadasiva Aiyar, J.—That the members of the family also were not bound to set it aside within one year.

Per Sadasiva Aiyar, J.—Symbolical delivery has not the effect of dispossessing any person other than the judgment-debtor.

Appeal under clause 15 of the Letters Patent against the Judgment of the Honourable Mr. Justice Spencer in Second Appeal No. 1282 of 1912, preferred to the High Court against the decree of the District Court of Madura in Appeal Suit No. 389 of 1910 (O. S. No. 546 of 1908 on the file of the Court of the District Munsif of Dindigul).

The following were the judgments in the second appeal.

Spencer, J.—The appellant, who was the plaintiff in the first court, is the purchaser from one Kuppanna Nadar of his interest in the suit property which he had obtained by purchase in Court-auction in execution of his decree in O. S. No. 317 of 1903 on the file of the District Munsif's Court, Dindigul. That suit was brought against one member of an undivided family for his one-third share in four items and for one item of self-acquisition; the first and the third respondents in the second appeal are brothers of the defendant's father in that suit. The plaintiff in that suit having purchased these items in Court-auction on 9th September 1905 applied for delivery of possession of the same and was referred to a regular suit by an order of the District Munsif of Dindigul, on the 7th September 1906. He sold his rights to the present plaintiff on the 11th December 1907. This suit was brought on the 12th October 1908 for possession of the plaintiff's one-third share in four items after partition and for the whole of the fifth item, those being the properties which were purchased by Kuppanna Nadar in Court-auction subject to the hypothecation rights of one Subban Chetty. The present appellant having obtained a decree in the Court of First Instance, additional evidence was admitted by an order of the Appellate Court with the result that the appeal was allowed and the suit was dismissed.

The first objection taken here is that the Lower Appellate Court should not have called for a report from the District Munsif on the additional evidence recorded by him. We feel satisfied that the District Judge who disposed of the appeal did not allow his mind to be prejudiced by the act of his predecessor or by the finding recorded by the District Munsif in consequence of the order. He observes in paragraph 3 of his Judgment: "Objection has been taken that a revised finding is not authorised by the Procedure

Ayyakutti Mankondan v. Periasawmi Koundan.

Code in such cases. As far as I am concerned, the point is not material as an independent consideration of the evidence is in any case necessary."

The next point that has been argued is that Ex. VIII being an unregistered document should not have been admitted in evidence. The question is whether this document is an instrument operating or purporting, to create, declare, assign, limit or extinguish any right, title or interest to or in immovable property within the meaning of S. 17 of the Indian Registration Act. A reference to Ex. VIII shows that it is composed first, of lists of properties which were in possession of the different members of the undivided family before division and thus were available for division. At the end all the properties are clubbed together and the total value is stated as well as the value of each share. Then a note follows: "In the presence of the witnesses named hereunder we divided." Below this all the three members of the family have signed, and the signatures of the witnesses follow beneath. It appears to be a record or memorandum of the property subjected to a division that according to the oral evidence, took place on the date on which it was written. But it can hardly be said to create or declare any right over any specific immovable property, or to declare any one's separate title in a divided portion of what was previously undivided, as the immovable property which fell to the share of particular members is not described. There is nothing in this document from which we can gather what was the separate share of any member who took part in the partition. In fact, it is imperfect as a deed and one which, if presented for registration, would, I think, have been rejected for vagueness. It is, moreover, in evidence that the parties contemplated executing a regular partition deed, but that no such document was executed.

A number of authorities have been quoted in which the liability to registration or to stamp duty of documents, which might be construed as partition deeds has been decided. These decisions afford but little guidance to us for deciding this case, as each document must be adjudicated with reference to its contents. I think that Ex. VIII did not require registration. The respondents also rely on the decision in *Subramania Aiyar v. Savitri Ammal* [1] as showing that the document was admissible for proving the divided status of the family and assert that this

1. (1908) 19 M. L. J. 228.

is the only use that the Judge has made of it. There can be no doubt that a document which merely declares the divided status of a family would not require registration. In this view also the objection to the want of registration of Ex. VIII appears to be unsustainable.

The third ground of appeal taken in the arguments before us is that the question as regards division became final by the order in execution proceedings passed by the District Munsif of Dindigul on the 7th September 1906, which was not appealed against within one year. This point was not taken in the plaint, and after hearing the arguments addressed to us in support of it I do not think that it can be sustained.

Article 11 of the Limitation Act and O. XXI, R. 103 of the Civil Procedure Code, do not bar the respondents from setting up the plea of division in this suit. A perusal of the District Munsif's order (Ex. B) shows that he did not finally decide the question of partition, or in fact, form any decided opinion as to the respective claims of the parties to the properties sought to be put in the possession of the decree-holder and auction-purchaser. The District Munsif merely observed that under the circumstances he was not prepared to hold that the counter-petitioners who are now the respondents (Respondents Nos. 1 and 3) had established that there was a completed and valid partition as alleged by them. These proceedings are described in the order as being summary, the evidence was not considered in detail, and allusion is made to the filing of a regular suit for partition before the decree holder, Kuppana Nadan, was entitled to ask for actual possession. The order was in its result unfavourable to him to the extent that he was not allowed to get actual possession under S. 318 of the old Code of Civil Procedure, but it was not altogether unfavourable to the respondents. The case is, therefore, similar to that of *Alwar Iyengar* v. *Zellevegar* 1.

In the result I consider that the second appeal should be dismissed with costs.

Sadasiva Aiyar, J.—During the arguments my mind was not quite settled on the question whether the document Ex. VIII is or is not "an instrument operating or purporting to create, declare, assign, limit, or extinguish any interest to or in

1. (1898) 9 M. L. J. 175.

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immovable property." As I interpret the document, it clearly declares that as regards certain immovable properties, the parties to the document have no longer a joint interest therein with rights of survivorship. Its clear result according to its terms seems to be that no portion of the lands mentioned in it is thereafter jointly owned by all the parties to it. No doubt, it does not state which particular land was thereafter, to be enjoyed separately by which particular co-parcener, or whether the entire land was taken by one or more co-parceners alone separately or in separate rights or as tenants-in-common; but it *does* extinguish the *joint rights* in immovable property which formerly existed. I am, therefore, inclined to hold that Ex. VIII requires registration.

Next, it is contended by respondent relying on *Subramania Iyer* v. *Savitri Ammal* [1] that even if the document required registration, its not being registered, has only this legal effect, namely, that it cannot affect the immovable property comprised therein and cannot be received as evidence of any transaction affecting such property, (see S. 49 of the Registration Act), but that it can be received as evidence of the fact that the parties to it have become divided in *status*. I feel very doubtful whether this argument is sound. If the document cannot affect the joint rights in the lands which belonged to the members of the joint family and if survivorship therefore still subsists among the members of the family so far as these lands are concerned it is difficult to see how a divided *status* could be established between the parties to the document. In *Subbaya* v. *Maddulatiah* [2] it was held that an unregistered permanent lease is inadmissible in evidence to prove the nature of the possession which the lessee had. In *Lakshmamma* v. *Kameswara* [3] it was held that although the deed in question in that case showed that the execution of another deed with reference to the rights in immovable property dealt with by the deed in question was in contemplation, yet the deed in question was not admissible in evidence *even as regards the movable property comprised in it* as the document required registration owing to the immovable property comprised in it being of the value of over Rs. 100. The learned Judges say "The transaction evidenced by the agreement is, therefore, one and indivisible and the partition of the movable property cannot be separated from the partition of the rest." I think that the

1. (1909) 19 M. L. J. 228. 2. (1907) 17 M. L. J. 469.
3. (1889) I. L. R. 13 M. 281.

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division of *status* created by Ex. VIII in this case cannot be logically or appropriately separated from the extinction of joint rights in immovable property effected by the same document, and if Ex. VIII is inadmissible in evidence as far as proof of such extinction of rights is concerned, it cannot also be admitted in evidence as regards the creation of a divided status among the family members. In *Upendra Nath Bannerjee* v. *Umesh Chandra Bannerjee* [1] it was held that, where the defendant in a suit sought to use an unregistered partition deed to prove that the property covered thereby ceased to be joint property, the document was inadmissible under S. 49 of the Registration Act. As the learned Judges say, (see page 378) " title to such property has been *altered* by the partition transaction without proof of which the property *would still retain all the incidents of joint property.*" I am inclined to hold that the case, in *Subramania Aiyar* v. *Savitri Ammal* [2], is inconsistent with the principle of the decision in *Lakshmamma* v. *Kameswara* [3], and I would, with the greatest respect, dissent from the opinion expressed in *Subramania Aiyar* v. *Savitri Ammal* [2]. Coming to the other question, namely, whether the order passed by the District Munsif of Dindigul on 7th September 1906 became final as not having been set aside within a year, this question again is one of great difficulty. The order, Ex. B, was passed in a proceeding which, though initiated under S. 334 of the old Civil Procedure Code, was treated as a petition filed under S. 335, (see para. 3 of the order). Under the first paragraph of S. 335, the Court may pass " such order on the petition as it think fit, " the petition in this case being a complaint by the purchaser at the Court auction sale that he was resisted and obstructed in his attempt to get actual possession of the properties by a person other than judgment-debtor claiming in good faith the right to the possession of the property. The order which the Court passed was, that the purchaser should get symbolical or constructive possession of a one-third share in items 1 to 4 and also constructive possession of the equity of redemption of item 5, such possession to be given in the manner provided for by S. 319 of the Civil Procedure Code. Hence actual possession of items 1 to 4 was not given. As regards item 5 it was in the possession of a mortgagee and he could not be actually

1. (1910) 15 Cal. W. N. 375.
2. (1908) 19 M. L. J. 228.
3. (1889) I. L. R. 13 M. 281.

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dispossessed and hence formal possession was ordered to be given of item 5 also. The 2nd paragraph of S. 335, says that the party against whom an order is passed under the first paragraph may institute a suit to establish the right which he claims to the present *possession* of the property but, subject to the result of such suit, if any, the order should be final. The question raised is whether when no actual dispossession of the obstructing and resisting party has taken place in consequence of the order passed by the court in favour of the purchaser and when the court auction purchaser has been given only symbolical or constructive possession the obstructing or resisting party is bound to bring a suit within one year to set aside the order giving symbolical, formal, or constructive possession and whether, if he fails to do so, he is bound by the findings on which the order was based in any suit between himself and the court auction purchaser which may be subsequently brought. As I said, the question is not free from difficulty. That question cannot arise under the new Civil Procedure Code as by O. XXI, R. 99, the only order on the petition of the decree-holder which can be passed, if the court finds that the obstruction was not on behalf of the judgment-debtor, is an order for dismissal of the petition and not "such order as the court thinks fit" as it was under the old S. 335. In *Kishori Lal Goswami* v. *Lala Shib Lal* [1], it was held that the delivery of possession of a land under S. 319, Civil Procedure Code, to a purchaser in execution does not cause dispossession of the actual possessor within the meaning of S. 335 of the Civil Procedure Code and that the person in the actual possession cannot complain under S. 335. This case seems to show that no order can be passed under S. 335 except an order for actual possession or actual dispossession and that an order for possession of an undivided share by a proclamation through beat of drum, etc., is not an order passed under S. 335. If a tenant in possession is directed to pay rent to the court auction purchaser and does attorn in pursuance of the possession given under S. 319 that might amount to actual dispossession of the resister or obstructor in some cases. In *Ibrahim Mullick* v. *Ramjadu Rakshit* [2], this case in 1 Calcutta Weekly Notes 343 was followed. The case of *Brajabala Devi* v. *Gurudas Mundle* [3], really dissents from the opinion expressed in the

1. (1897) 1 C. W. N 343. 2. (1903) I. L. R. 30 C. 710.
3. (1906) I. L. R. 33 C. 487.

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above two cases in *Kisori Lal Goswami* v. *Lala Shib Lal* [1], and *Ibrahim Mullick* v. *Ramjadu Rakshit* [2], though it professes to distinguish those cases by pointing out that the actual decisions in those cases are correct because there was no actual dispossession of the persons in possession by the symbolical possession given to the purchaser in court auction. In *Chidambara Pattar* v. *Ramaswamy Pattar* [3], it was held by the Full Bench that S. 283, of the old Code and Art. 11 of the Limitation Act did apply to a suit brought more than a year after the claim to attached debt had been disallowed. The learned Judges held that the word "possession" was used in Ss. 278 to 281, in its legal technical sense so as to cover constructive possession and possession in law. The learned Judges also refer to S. 355 of the Civil Procedure Code, in which the word "possess" is used as applicable not only to tangible property but also to debts and other intangible property. In the case of *Alwar Iyengar* v. *Zellevegár* [4], the Munsif in an enquiry under S. 335 concluded his order thus:— "Under these circumstances I think it is useless to hold a summary enquiry as to the present possession of the land." The learned Judges say "It is possible that the Munsif for some reason or other declined to give a decision on the matter on which he has to decide under the section. If this view is correct, it follows that the order is not one that is required to be set aside by a suit. Can we say in the present case that, in the order Ex. B. the District Munsif declined to have a summary enquiry as to the right to possession. I am inclined to think that he did not hold an enquiry and further held that the plaintiff was entitled to symbolical possession of a one-third share, in items 1 to 4 and to possession of the equity of redemption in item No. 5. The only case which, though not exactly in point is based on somewhat similar facts is a case *Fidaye Shikdar* v. *Ozeeooddeen* [5]. There, S. 269 of Act VIII of 1859 was relied upon by the plaintiff as barring the defendant from contesting the plaintiff's title to possession as the defendant had not set aside by suit within one year the order passed in favour of the court auction purchaser putting him in possession of the right title and interest of the judgment-debtor in the plaint lands after overruling the objection of the defendants who were in actual possession. The learned

1. (1897) 1 C. W. N. 343. 2. (1903) I. L. R. 30 C. 710.
3. (1903) I. L. R. 27 M. 67. 4. (1898) 9 M. L. J. 175.
5. (1867) 7 W. R. 87.

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Judges of the Calcutta High Court held that S. 269 of Act VIII of 1859 which combines the provisions of S. 335 of the last Civil Procedure Code and Art. 11 of the Limitation Act does not contemplate that the party in actual possession should sue regularly to get possession within one year. In *Kocherlakota Venkatakristna Rao* v. *Vadrevu Venkappa* [1], very instructive observations occur on the question of possession. Where physical possession is not given, the giving of symbolical and formal possession, though it might be as good as the giving of actual possession so far as the judgment-debtor was concerned, could not be availed of against the third persons in actual possession. On the whole (though after much hesitation) I have come to the conclusion that formal possession of an undivided share or of a mere equity of redemption in lands which are in the actual possession of others will not constitute such a dispossession of any person other than the judgment-debtor as would oblige such a person to bring a suit within a year of the order passed in the auction purchaser's favour under S. 335 at the risk of being bound by the finding in such order if such a suit was not brought.

Having regard to the finding on my first point, however, that Ex. VIII should not have been admitted in evidence for any purpose and that the document and the evidence of defence witness No. 5. which was admitted on remand by the first court, and the further evidence of 1st defendant. recalled and again examined on remand were improperly admitted and considered by the Lower Appellate Court, I would remand the case to the Lower Appellate Court to submit a revised finding on the fourth issue after rejecting from consideration Ex. VIII and the said additional oral evidence. As however, my learned brother is of opinion that the Lower Court's decree be confirmed his judgment dismissing the appeal with costs will prevail under S. 98 cl. 2."

The sole question argued and considered in Letters Patent Appeal was as to the necessity for registering Ex. VIII which ran as follows (the portions of it not necessary for understanding the judgments are omitted.)

Page 250: 24th Vaigasi, Krothi (5th June 1904):—Particulars of the properties which are in the possession of Nalla Koundan.

....

Total ... Rs. 3,639-3-3.

1 (1903) I. L. R. 27 M. 262, at pp. 268 to 270.

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(Sd.) N. Arumuga Koundan, N. Periasami Koundan and N. Kuppusami Koundan.'

Page 251. Particulars of the properties which are in the possession of Arumuga Koundan.

Krothi, Vaigasi 24th (5th June 1904).

....

Total ... Rs. 5,837-7-0.

(Signed) N. Arumuga Koundan, N. Periasami Koundan and N. Karuppasami Koundan.

Properties which are in the possession of Periasami Koundan 24th Vaigasi, Krothi, (5th June 1904.)

....

Total ... Rs. 5,343-0-0.

(Signed) N. Arumuga Koundan, N. Periyasami Koundan and N. Karuppasami Koundan.

Particulars of the properties which are in the possession of N. Na. Karuppasami Koundan 24th Vaigasi Krothi, (5th June 1904.)

....

Total ... Rs. 7,148-0-0.

(Signed) N. Arumuga Koundan, N. Periasami Koundan and Na. Karuppasami Koundan.

Page 256. 24th Vaigasi Krothi, (5th June 1904) :—Particulars of the properties which are in the possession of Nalla Koundan—Arumuga Koundan—Periasami Koundan and Karuppasami Koundan.

....

Estimate Total......Rs. 21,862-10-3.

According to the list of all the properties in our family the total is ... Rs. 21,862-10-3.

For each share it comes to .... Rs. 7,290- 6-1.

In the presence of the witnesses named hereunder we divided.

(Signed) N. Arumuga Koundan, N. Periasami Koundan and N. Karuppasami Koundan.

....

5-6-04.

V. C. Seshachariar for Appellant:—The two questions that arise for consideration are:—

1. Whether Ex. VIII is a partition deed.

2. Whether, if it is, it is not admissible in evidence to prove a divided status because it is not registered.

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My submission is Ex. VIII itself effects a division. An instrument effecting a division in status without dividing properties by metes and bounds require to be registered and Ex. VIII is such a document.

Chief Justice:—The difficulty is in deciding whether Ex. VIII itself effects a partition or merely records a partition previously effected.

When the terms of a contract are reduced to writing, the writing itself is the evidence of the contract and the Court cannot allow evidence to be adduced of oral arrangements made before the writing. *Vencataramaniah Pantulu* v. *Vencatáramana Doss* [1].

Ex. VIII must be held to be the partition between the parties.

T. V. Muthukrishna Aiyar for Respondent:—My contention is that Ex. VIII is merely a memorandum of a prior partition. The deed refers to a partition made before it was executed. From the fact that the prior partition was effected on the same day as that of the execution of the deed, it does not necessarily follow that the deed was intended by the parties to be the partition itself.

Even if it were otherwise there remains the question whether Ex. VIII is not admissible in evidence for the purpose of proving a division in status. My submission is that it is.

The Court delivered the following

Judgment:—We think that Ex. VIII is a formal declaration of division of status attested by witnesses and that as such it affects the immovable properties mentioned therein, and is inadmissible in evidence. We accordingly direct Ex. VIII and the evidence relating thereto to be excluded from the record, and have decided to call on the District Judge to submit revised findings on issues 1 and 4 on the evidence on record. The findings should be submitted in six weeks. Seven days will be allowed for filing objections. The other questions are reserved.

In compliance with the order contained in the above Judgment, the District Judge of Madura submitted findings.

The Court delivered the following

Judgment:—We accept the findings and set aside the decree of the Lower Appellate Court and restore that of the District Munsif with costs in this and the Lower Appellate Court.

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1. (1906) 29 M. 200 : 16 M. L. J. 69 (F. B.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore*

The Official Receiver of Trichinopoly ... *Appellant* (*The Official Receiver of Trichinopoly*)

v.

S. A. Somasundaram Chettiar and others. *Respondents* (*Insolvents and Creditors 1 to 15.*)

Official Receiver of Trichinopoly *v.* Somasundaram Chettiar.

Provincial Insolvency Act—Ss. 4 (a), 18, 19, 36—Trust created by debtor in favour of some of the creditors of most of the properties for the discharge of debts —S. 36—Transfer in good faith and for valuable consideration—"Void," meaning of—S. 4 (a)—A creditor appointed trustee for discharge of debts, a third person, within the meaning of—Official receiver becomes receiver of the insolvent's property only by order under S. 18.

Where a debtor with the consent of the majority of his creditors executed a trust deed in favour of three of them in respect of most of his properties for paying *pro rata* all his creditors, and 2 years after the debtor put in a petition in insolvency and was adjudicated an insolvent,

Held that the trustees were transferees in good faith and for valuable consideration within the meaning of S. 36 of the Provincial Insolvency Act and the trust deed could not be avoided under that section.

"Void" in S. 36 means only voidable. The word "Purchaser" in the section is used not in the ordinary legal sense of one who has bought a property under a contract of sale but means a person who has given valuable consideration.

Hance v. *Harding* [1] followed.

"Transfer to a third person" in S. 4 (a) includes the conveyance to some of the creditors themselves as trustees for the general body of creditors.

The Court should, if it intends the Official Receiver to become vested with the insolvent's property, pass an order under S. 18 appointing a receiver. The practice in the mofussil of treating the Official Receiver as vested with the properties of the insolvent as soon as an adjudication order is made without a preliminary order under S. 18 appointing a receiver, is illegal.

Appeal against the order of the District Court of Trichinopoly in I. P. No. 11 of 1912 dated the 3rd day of January 1914.

The facts of the case, appear sufficiently for the report in the judgment of Mr. Justice Moore.

S. T. Srinivasagopalachari for Appellant.

C. V. Ananthakrishna Aiyar for Respondent.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments:—*Sadasiva Aiyar, J.*—The question in this case is whether the trustees under Exs. II and III are purchasers for valuable consideration. In *Narayan Coomari Debi* v. *Shajani Kanta Chatterjee* [2], it was held that a contract to pay remuneration to a person appointed as an executor was a contract for valuable consideration proceeding from the person appointed as an

* A. A. O. No. 197 of 1914. 1st February 1916.

1. (1888) 20 Q. B.D. p. 732 at p. 738 2. (1894) I. L. R. 22 C. 14.

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executor. The learned Judges say at page 18 "The plaintiff who was not legally bound to accept the office of executor,......applied for probate as executor, and having obtained probate, he performed duties of the executor." "There was thus, we think, a clear consideration for the alleged contract. (See Indian Contract Act, S. 2 (d), Addison on Contracts, page 2, 9th Edition, and Pollock on Contracts, 5th Edition, page 176)." A *responsibility* therefore taken by a person to whom properties are transferred in consideration of his taking such onerous work seems to me to fall within the expression "valuable consideration" found in S. 36 and S. 38 (c) of the Provincial Insolvency Act. Hence the three creditors who undertook to be trustees of the insolvents' properties for the benefit of all the creditors and have admittedly been discharging the duties of trustees do come in my opinion within the protection afforded to transferees for 'valuable consideration' in Ss. 36 and 38.

So far as regards the property, (a house,) not transferred to them under the trust-deeds, the Official Receiver is entitled to take possession of it notwithstanding the promise of most of the creditors made to the insolvents not to proceed against it for realization of their claims.

S. 16 clause 2 (a), no doubt, makes the whole of the property of the insolvents "to be vested in the Court or in a receiver as hereinafter provided."

But on the execution of Exs. 2 and 3, the properties mentioned therein had ceased to be the property of the insolvents and had become vested in the three creditors as trustees and hence it seems to me that S. 16 clause 2 (a) which vests only the property of the insolvents in the court or the receiver cannot by itself transfer those properties to the receiver.

The words "receiver as hereinafter provided" seem to to refer to the succeeding S. 18 which says that the Court may appoint a receiver for the property of the insolvents and that such property shall thereupon vest in the receiver. S. 19 (2) says "where any Official Receiver has been appointed for the local limits of the jurisdiction of any Court having jurisdiction under this Act, he shall be the receiver for the purpose of every order *appointing a receiver* issued by any such Court." Reading then Ss. 16, 18 and 19 together, it seems to me that it is the duty of the Court, if it intends the Official Receiver

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to become vested with the title to the insolvents' property to make an order under S. 18 appointing a receiver. The practice which (I am informed) obtains in the mofussil of treating the Official Receiver as vested with the properties of the insolvents as soon as an adjudication order is made without preliminary order under S. 18 appointing a receiver seems to be illegal.

In the present case, it does not appear that there was an order under S. 18 passed by the District Court appointing a receiver. Assuming that there was such an order and that the Official Receiver by the force of S. 19 became the receiver of the insolvents' properties, the properties mentioned in Exs. 2 and 3 had ceased to be the insolvents' properties long before the date of adjudication and unless Exs. 2 and 3 are cancelled or are void against the receiver he cannot claim any right to deal with them.

In this case the insolvents were adjudicated on their own petition and not on the petition of any creditor. Under S. 6 Cl. 3 of the Insolvency Act, the debtor cannot avail himself of the transfer of his property to a third person for the benefit of his creditors generally as an act of insolvency entitling him to be adjudicated as an insolvent. Under S. 6 clause 4 (c), a creditor can so avail himself of such transfer (see S. 4 Cl. (a)), *provided the transfer occurred within three months before the presentation of the petition.* It has been held, in *Manmohan Das* v. *N. C. Macleod* [1] that, on the general principles enunciated by the Privy Council in *Khoo Kwat Siew* v. *Wooi Taik Hwat* [2], the assignment of the whole of the property of a trade to trustees for the benefit of the creditors is void as against the Official Assignee. In that case, the assignment took place (1) *within three months* of the petition for adjudication (2) *which was presented by a creditor* (3) who did not assent to the assignment. Jenkins, J. distinguishes *Dhanjibhai Khorsetji Ratnagar's case* [3] which held that such a transfer was not void in insolvency proceedings on the ground that the assignment in the case did not constitute the act of insolvency on which the adjudication was based, the adjudication in that case having been made on the insolvents' own petition. The learned Judge however seems not to have thought much of that distinction by the use of the phrase "the distinction

1. (1902) I. L. R. 26 B. 765.   2. (1891) I. L. R. 19 C. 223.
3. (1873) 10 B. H. C. R. 327.

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for what it may be worth" (see page 776). Russell, J. says at page 768 "as to conveyance in trust for all creditors, it has been held from the earliest times of bankruptcy law that as the effect of such a conveyance must be to delay or defeat creditors, the law will presume an intention to delay or defeat creditors, and the conveyance would therefore be invalid as against, and perhaps even without reference to the policy of the bankruptcy laws."

Their Lordships of the Privy Council in *Khoo Kwat Siew* v. *Wooi Taik Hwat* [1], say broadly that the well-known rule of law is "that if a trader assigns all his property except on some substantial contemporaneous payment, or some substantial undertaking to make payment *in futuro,* that is an act of bankruptcy and is void against the creditors and the assignee." But can a creditor for whom that act is not available as a ground for the petition to adjudicate the debtor as an insolvent treat it as void as against him? A creditor cannot present a petition for adjudication if the act of bankruptcy on which he relies is one to which he was himself a privy. See Williams on Bankruptcy pages 4, 5 and 46, 11th Edition. If again the transfer for the benefit of creditors has taken place more than three months before the petition, no creditor can avail himself of it. I do not think their Lordships of the Privy Council intended to hold that a transfer to trustees executed (say) 7 years before the adjudication, should be treated as void against the creditors and the assignee. I at first thought that as S. 4 (a) of the Provincial Insolvency Act says that the transfer of property for the benefit of creditors must be made *to a third person* in order to constitute an act of insolvency, the transfer made to three of the creditors themselves is not such an act. Though I am unable to fully appreciate the object of the Legislature in using the expression 'third person', I do not think it was intended to mean more than "to a person who is not a trustee for the debtor himself." (S. 24 of Statute 11 and 12 Victoria, Chapter 21 uses the expression "shall voluntarily convey assign, transfer... ..any estate real and personal......*to any creditor or other person whomsoever* or to any person in trust for or to or for the benefit of any creditor or other person whomsoever.") In the Bankruptcy Act of 1883, S. 4 (1) (a), 46 and 47 Vict. the expression is "he makes a conveyance of property *to a trustee or trustees* for the benefit of his creditors generally." I therefore do not think that the words "third person"

1. (1891) I. L. R. 19 C. 223 : L. R. 19 I. A. 15.

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in S. 4 (a) were intended to exclude the conveyance to some of the creditors themselves as trustees for the general body of creditors. The question again was not argued before us. Further while S. 4 (a) of the Provincial Insolvency Act of 1907 mentions "transfer of the debtor's property," the corresponding section of the Presidency Insolvency Act of 1909 " (S. 9 clause (a) uses the expression "transfer of *all or substantially all* his property. " If it be held that as S. 4 clause (b) of the Provincial Insolvency Act refers to a transfer of the debtor's property or *any part thereof* whereas S. 4 (a) refers to "transfer of his property," S. 4 (a) applies only where the transfer is of all his property without a single exception, then it is arguable that the transfer under Exs. 2 and 3 in this case is not an act of insolvency as a house was retained by the debtors. This point also was not argued and as at present advised I think that S. 9 (a) of the Presidency Towns Insolvency Act and S. 4 (a) of the Provincial Insolvency Act mean the same thing though the words "all or substantially all" were introduced in the Presidency Towns Insolvency Act of 1909 at the suggestion of the Bengal Chamber of Commerce which seems to have thought that S. 4 (a) of the Provincial Insolvency Act was, ambiguous.

Though S. 36 of the Provincial Insolvency Act states that certain transfers are *void* against the receiver, it has been held in *Khan Sahib Bangi Abdul Khadar Saheb* v. *The Official Assignee of Madras* [1] that the similar expression used in S. 55 of the Presidency Towns Insolvency Act means that such transfers are only voidable and not void. I respectfully concur with that opinion especially as in S. 36 there is a provision for annulling such a transfer by the Court which annullation will be unnecessary if it is void and not merely voidable.

There is besides no injury to the general body of creditors by not treating as void transfers to trustees for the benefit of all creditors made more than three months before the petition in insolvency, provided that the trustees are honest and capable. On the other hand, it saves the creditors the burden of the Official Receiver's fees. Even where the trustees appointed under the private trust-deed are found dishonest or incapable there are provisions in S. 57, 58, 61, 73, etc. of the Trusts Act under the beneficiaries (the creditors) can protect their interests by

1. (1914) M. W. N. 247.

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taking proper proceedings. On the whole, after having given anxious consideration to the subject and not without hesitation, I have come to the conclusion that the transfer made *bona fide* to trustees by the debtor cannot be cancelled under S. 36 and I would confirm the order of the District Judge. The creditors 12 to 14 will have their costs out of the trust properties in their hands and the appellant (Official Receiver) out of the property in his hands.

Moore, J.

Moore, J.:—I agree with the conclusion arrived at by my learned brother whose judgment I have had the advantage of perusing.

The facts are shortly these:—

Two traders named S. A. Somasundaram Chetti and S. A. Muthukumara Chetti being unable to pay their debts convened a meeting of their creditors, and on January 2nd 1911, entered into an agreement Ex. I with the majority (about four-fifths) of their creditors. The agreement provided *inter alia* that all the properties of the debtors should be handed over to three trustees, who were themselves creditors of the debtors. The trustees were to realise the outstandings due to the debtors, sell their properties, pay such creditors as were willing to receive the amount due to them *pro rata* and retain with them the dividends due to such of the creditors as had not assented to the arrangement. The creditors were to be satisfied with the dividends so distributed, and the debtors were to have no claim to the surplus amount.

The terms of the arrangement were embodied in a trust-deed Ex. II, which, one of the debtors Somasundaram Chetty executed in favour of the abovementioned trustees on 4th January 1911 by which he handed over to the trustees the whole of his properties described in the document as well as any other properties which might have been omitted. In Ex. II it is stated that the debtors had executed a mortgage to the trustees in respect of a house which they had been allowed as an act of grace to retain as a residence.

The other debtor executed a similar trust deed Ex. III in favour of the same three persons confirming the agreement of 2nd January 1911.

The trustees it appears took possession of the properties and distributed a dividend to the majority of the creditors. The amounts due to the creditors, who had not assented to the arrangement,

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were, it is said, deposited in the Indian Bank on 9th October 1912, that is, within 2 years of the execution of Exs. II and III. The debtors presented an insolvency petition to the District Court, and were adjudged insolvents by the Official Receiver on 17th December 1912.

The question for determination is whether the trust deeds are void as against the Official Receiver, and whether the latter is entitled to an order calling upon the trustees to deliver over the properties of the insolvents in order that he may distribute it among the creditors. Mr. Srinivasagopalachariar, contends that the effect of the making of the adjudication order was to vest all the properties of the insolvents in the Official Receiver under S. 16 of the Provincial Insolvency Act, that the Official Receiver is alone entitled to administer the estate, and that the District Judge was in error in holding that the trustees were "transferees in good faith and for valuable consideration." The District Judge has not dealt with the question whether the trust deeds were void in a satisfactory manner, and merely observes that "the consideration was the obtaining as much as possible of their claims for the whole body of creditors."

It appears to be clear that the trustees acted in good faith. The word "purchaser" in the section is used not in the ordinary legal sense of one who has bought a property under a contract of sale and purchase but means a person who has given valuable consideration (*Hance* v. *Harding* 1).

I was at first inclined to doubt whether the trustees could be regarded as transferees or purchasers for valuable consideration but on further consideration I agree with my learned brother that the undertaking of the duties of trustees was a good consideration. The act or promise in the definition of consideration in S. 2 clause (d) of the Contract Act has been described in certain English cases which have been followed in India as something advantageous to the promisor or to a third person or which is onerous or disadvantageous to the promisee. See *Currie* v. *Misa* 2 and *Muhammad Unnisa* v. *J. C. Bachelor* 3.

The learned vakil for the appellant has referred us to *Manmohan Das* v. *N. C. Macleod* 4 in which it was held that the assignment of the whole of his property by a trader to trustees for the benefit of creditors was void as against the Official

1. (1888) 20 Q. B. D. 732 at 738.
2. (1875) L. R. 10 Ex. 153 at 162.
3. (1905) I. L. R. 29 B. 428.
4. (1902) I. L. R. 26 B. 765.

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Receiver, but in that case the assignment took place within three months of the petition for adjudication which was presented by a creditor. It appears to be clear from S. 4 (c) of the Provincial Insolvency Act that a creditor cannot treat a transfer by a debtor of his property to a third person as constituting an act of insolvency entitling the creditor to present the insolvency petition unless such transfer has occurred within three months before the presentation of the petition.

Exs. II and III were executed nearly two years before the presentation of the insolvency petition and I do not think that their Lordships of the Privy Council in *Khoo Kwat Siew* v. *Wool Taik Kwat* [1], intended to lay down that a transfer by debtors to trustees for the benefit of creditors should in all cases be treated as void as against the creditors and the assignee. I agree that the term "void" in S. 36 of the Provincial Insolvency Act means "voidable". There is a further difficulty in this case.

No order appears to have been passed by the District Court under S. 18 of the Provincial Insolvency Act. So far as experience goes, it is the practice in the mofussil to forward insolvency petitions presented by debtors to the Official Receiver, and after the adjudication order, the properties are treated as having vested in the official Receiver, no order appointing a receiver being passed by the Court under S. 18 of the Act.

This practice appears to be illegal, and I think that the word "receiver" in S. 19 (2) means a receiver appointed under S. 18 (1) and that the words "receiver as hereinafter provided in S. 16 (2) (a)" refer to the succeeding S. 18. I agree that the transfers Exs. II and III having been made *bona fide* and for valuable consideration cannot be cancelled and that the District Judge's order should be confirmed and in the order as to costs which my learned brother proposes to make.

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1. (1891) I. L. R. 19 C. 223.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Kattalai Michael Pillai and others ... *Appellants* * *(Plaintiffs Nos. 1 to 3 and 5)*

v.

Right Reverend J. M. Barthe, S. J., Bishop of Trichinoply, and others. *Respondents (Defendants).*

Michael Pillai *v.* Bishop of Trichinopoly.

Religious Endowment—Roman Catholics—Church—Right to prevent a class to enter a portion of Church—Customary right unknown to the authority of Bishop—Canon Law, sole authority—Cannot be altered by agreement by members, or custom—Caste cannot be recognised as corporation among Christians—Agreement between castes binding only on actual parties.

Where a section of Roman Catholics in a particular locality claiming to be high caste Christians sought to prevent another section from entering upon or occupying a portion of the Church premises where they claimed to have the exclusive right of being seated and of partaking in the ceremonies conducted there notwithstanding the order of the Bishop that there should be no such distinctions in the Church.

Held that under the rules of the Canon Law which must govern the matter, the Bishop's authority (subject to control from higher Church authorities) was supreme and the plaintiffs could not question it.

Per Napier, J. : —The right claimed is inadmissible as a customary right, a right of that character being unknown to law.

Per Curiam :—Church buildings as soon as they are consecrated become vested in the Pope for the worship of God according to the tenets of the Roman Catholic Church and no Bishop can bind the Church or his own successor by any agreement of his relating to Church property.

Per Napier, J. : —The Canon Law is the sole guiding authority as to the rules binding on the congregation as members of the Roman Catholic Church and the congregation of a particular locality cannot by an agreement between themselves seek to derogate from the authority of the rulers of the Church as conferred by that law.

Per Sadasiva Aiyar, J. :—Castes as distinct corporations in the way in which they are understood among Hindus, cannot be recognised among Christians and as such an agreement purporting to be between two castes can be binding only on the actual parties to the agreement.

Second Appeal against the decree of the District Court of Tinnevelly in Appeal Suit No. 89 of 1913, preferred against the decree of the Court of the Subordinate Judge of Tinnevelly in Original Suit No. 62 of 1910.

T. Rangachariar, V. S. Govindachariar and *V. S. Kallabhiram Aiyangar* for Appellants.

W. Barton for Respondents.

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* S. A. No. 431 of 1914. 25th January 1916.

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The Court delivered the following

Judgments :—*Napier, J.* :—This an appeal from an appellate decree of the District Court of Tinnevelly dismissing a suit brought by five Roman Catholic Vellalas as representatives of the Pillais and Mudalis of Vaddakankulam against the Roman Catholic Bishop of Trichinopoly, the Parish Priest of Vaddankankulam and certain Shanan Roman Catholics the last being sued as representatives of the Nadars, asking for certain reliefs in connection with the Holy Family Church situate in the above village. The reliefs may be grouped as follows :—

1. A mandatory injunction to re-erect walls between what are called the two Churches in the above Church, the cause of action being the obstructing of the plaintiffs' right, the obtaining an order under S. 144 of Code of Criminal Procedure, and the demolition of the walls, all in November 1910.

2. A declaration that the ownership of the alleged Southern Church is vested only in the so-called high caste Christians of the plaintiffs' *vagaira*.

3. A declaration of the right of the plaintiffs' *vagaira* alone to enter it and an order restraining other so-called low caste Christians of the *vagaira* of the defendants 3 to 14 from entering it.

4. An order restraining the latter from entering the altar and other *peetams* and restraining the Bishop and the Parish priest from allowing them to do so. (The phrase 'entering the altar' is meaningless. Altar is probably used for Chancel).

5. A declaration of the sole right of the Pillais, Mudalis and so-called high caste Christians to perform services at the altar and join in the service of the congregation except on certain days.

6. A declaration of their sole right to conduct certain processions, have custody of the sacred images, and keys of the Church, ring the bell, etc.

7. A declaration that the *vagaira* of defendants 3 to 14 have no right to go in procession in palanquins in marriages through the streets inhabited by the plaintiffs and asking for appropriate injunctions in respect of the above declarations. The last claim was not argued before us; but the others were pressed by Mr. Ranga Chariar on the grounds of agreement and custom. It has been a little difficult to ascertain the extent of the claims as the

learned Vakil was naturally not familiar with the meaning of the words 'altar' and 'pulpit' and with the nature of the ceremonial and observances of the Catholic Church. He has, however, pressed those parts of the claim as have reference to the ritual as strongly as those connected with the exclusive rights in the so-called southern Church, and the custody of the whole fabric. The Bishop in his written statement has claimed that the Church fabric and site is vested in himself in trust for sacred uses and has asserted the sole right of himself and the Vicar to regulate the accommodation inside, to prescribe the part to be taken by the congregation in the services, and the ceremonies, has denied that any exclusive right or privilege can be claimed by members of any community, and has alleged that the so-called agreements have only been concessions which he has thought fit to withdraw. The Subordinate Judge who tried the case has in a judgment composed chiefly of long extracts from exhibits, sometimes inaccurately quoted, given certain reliefs which as already stated have been set aside in appeal. In arguing his case Mr. Rangachariar has relied on a Bull issued by Pope Gregory XV in 1623 recognising caste distinctions and has invited an expression from the Court as to the existence of these rights. Speaking for myself I do not propose to express any opinion on so broad a subject which has not been thoroughly argued before us and, in my opinion, does not arise. Whether the Courts have power to give declarations as between different classes of His Majesty's subjects on such matters and whether any action can be founded on a disregard of such rights save as they arise out of trusts are questions on which I have serious doubts; but these doubts need not be resolved here. What we have to decide is a narrower question namely whether by agreement or caste custom a Roman Catholic can claim exclusive privileges for his caste inside a Church against the directions of the Bishop having authority over that Church. I have had some difficulty in ascertaining from Mr. Rangachariar the legal nature of the rights claimed. He did not press his claim to the ownership of any part of the site of the Church but he put his claim as a customary right to deal with immovable property— "dealing with" covering the exercise of any exclusive privilege within the Church premises. Unfortunately he did not assist us by referring to any authorities on the subject of customary rights *in alieno solo* and indeed English Law furnishes no precedent for a claim so wide as this. Such

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customary rights as are recognised, of which there are many examples in the text books, have one feature in common, namely, that however large the community enjoying them and however frequent the exercise of the right they never amount to a continuous and complete deprivation of the owner of the soil of his natural exclusive right of user. Here the plaintiffs claim an exclusive right of user of a portion of the Church on all occasions when the Church is used, not, it is true, to the exclusion of *the owner* but to the complete exclusion of the owner's licensees. Again the custom on which the claim is based is not one arising out of and confined to the exercise in the particular land or tenement. On the contrary it is a so-called caste right *in personam* of application at all times and everywhere which the plaintiffs claim to enforce when in occupation of the tenement. I can find no precedent for any such claim. Whether the customary right be a profit *a prendre* or a right of unprofitable user such as to hold a fair or play games in a particular close, the custom has arisen in the close and has no other origin. Lastly the alleged customary right can only have been associated with this particular tenement since the construction of the Church between 1858 and 1872 a period quite insufficient to establish a right of customary user. Reference was made in the course of argument to the law of 'pews' in the established Church; but these are easements vested in an individual by virtue of a dominant tenement or are presumed to have had such an origin and have no relation to customary rights claimed by a class. For these reasons I have no doubt that the claim cannot be supported on the basis on which it was placed by the learned vakil for the appellants and that no customary right of the character is known to law. It is, however, abundantly clear on the record that the case has not been founded on any customary right *in alieno solo*, but on a claim of a right of freedom from contact which can have but one origin, strongly insisted on by all Hindu members of the caste, and evidently equally strongly adhered to by these so-called Christians—namely that of *pollution*. In the eyes of these plaintiffs the Shanars are non-touchables—persons whose contact defiles and entails ceremonial ablutions. Stated thus they can certainly claim a far longer period of customary observance than the foundation of this Church or the introduction of Christianity; and indeed their case on the alleged agreements means nothing more than the supposed

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recognition of this claim as one of right. The Vellalas are a high sub-caste of what are conveniently termed Sudras—though of course the term is not historically applicable to South Indian Dravidians, the whole caste of Sudras being however considerably below the three higher castes in the latter's estimation. The Shanars spring from a humble origin outside caste, but having raised their social position by their industry naturally seek the recognition due to their changed condition. It has been the effort of the Vellalas to keep them in their lowly status that has led to this trouble in the last 40 years. Conversion to Christianity has it seems in no way modified the pretensions of the former or taught them that sense of equality before God which is a cardinal feature of the Christian religion as well as of other religions. Turning now to the history it appears that the case, so far as it is based on agreements, is stated as follows in the plaint. Paragraph 10 alleges a stamped agreement in 1855 signed by the plaintiffs' caste and the caste of the defendants 3 to 14 in the presence of the Parish Priest to the name of the Bishop in pursuance of which two Churches were to be built side by side with a common Chancel so that worship should be seen from both Churches. The said agreement further provided that all other rights of control should remain vested in the plaintiffs' caste. It is alleged that accordingly each caste built its Church with its own labour and by its own contributions, the edifice being completed and consecrated in 1872. Paragraph 13 alleges that as the Nadars subsequently set up claims inconsistent with the agreement a compromise was made by the Parish Priest in 1877 agreed to by both parties amending that agreement which the Bishop bound himself to adopt and in consequence issued an Epistle in 1877 setting out the amended terms. This arrangement constitutes the alleged second agreement and on these two the suit is based. The appellants' vakil argues that the Lower Appellate Court has found the first agreement to be true and should accordingly have given effect to it. There is no foundation to this argument. The District Judge finds in paragraph 2 that no stamped agreement is forthcoming, though he does find that some arrangement was come to as to separation of castes. He states also in two paragraphs of his judgment that the case as presented before him was based on what is now treated as the second agreement evidenced by Ex. F, and I have no doubt that this is so. On the failure to prove the

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written agreement relied on in the plaint the vakil in the Lower Court probably abandoned that part of the case and it has now been raised here for the first time since the trial. On the evidence I have serious doubts whether the two castes ever did arrive to a clear arrangement. The fact that the written agreement was never signed seems to me fatal to the suggestion—and that the Priest never contemplated binding himself is clear from the fact that the draft agreement is only drawn as between the two castes, he not being a party. Even if he had been a party I should hold for reasons that will appear later that no such agreement could bind his successor or higher ecclesiastical authority. In this view, I have not thought it necessary to refer to Ex. XVI, the diary of Father Gregory covering the period of the dispute which demonstrates his zeal as the Parish Priest in endeavouring to make peace between the warring elements in his flock somewhat to the detriment of his authority and undoubtedly also at some sacrifice of the tenets of the faith. With regard to the alleged agreement founded on the language of Ex. F the District Judge has held in para. 9 that the document is both in terms and effect an *episcopal decree* "to speak of which as a contract is an obvious misdescription." We are invited to hold that the District Judge has misconstrued the document and that whatever be its form, its operation is that of a contract binding on the Bishop's successor. Mr. Barton has called our attention to an earlier document Ex. VI (*a*) a decree of the same Bishop issued soon after the consecration of the Church in 1872, as showing the point of view of the Ecclesiastical superior. It refers to an arrangement made between the two parties at the time when the construction of the Church was commenced, but proceeds by way of '*allotment*'; assignment and '*direction*' as to the share to be taken by the disputants in the ceremonies and concludes with the words "all that I have said in this *niroopam* are my orders". It appears however that the Nadars did not submit to this decree and Civil and Criminal Court proceedings between the parties continued up to 1877 (*vide* Exs. I, II and III) when the Nadras put in a petition to the Bishop, Ex. VI the effect of which is that they have refused to sign an agreement but are willing to abide by his orders. It is in response to that petition that the Bishop issued his decree Ex. F. It is, therefore, a matter free from doubt that the decree is not the result of an agreement come to between the Bishop and the con-

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testing parties, but is an order passed on a petition by one of the parties. It certainly reproduces the para that appeared in Ex. VI (*a*) as to the arrangement made at the time of the construction of the Church allotting separate naves in the Church to the disputants while it gives certain concession to the Nadar petitioners, but the District Judge is correct in holding that it is both in form and substance an episcopal decree. That it was intended to be such is clear from the endorsement on it by its author to the Parish Priest in which he used the Tamil word Kattalai *i. e.*, order, exhorts the Father to get this "*reglement*" faithfully observed and concludes "*Toute reserve faite de notre autorite*". The case on the second agreement therefore fails but even if there had been an agreement come to by which the Bishop bound himself to allow certain concessions to the weakness of his flock, I am clear that it was not in the power of the Bishop to use his unfettered right of control to prevent his successor exercising the same authority. That it is unfettered, save by higher authority, seems to me clear on the canons of the Church just as it is equally clear on the law applicable that a congregation has no power to select what canons it will follow and what disregard, and that the rules and jurisdiction of officers in the Church are to be sought in the canons of the Church and must be given effect to by the Courts.

Much reliance has been placed by the appellants' vakil on the decisions of the Privy Council in *Long* v. *Bishop of Cape Town* [1] and *Merriman* v. *Williams* [2] as laying down that the congregation of a particular Church can vary the canons of their religion from time to time. This contention, is based on a misunderstanding of the use of the term Church in those Judgments. The question in dispute in the first case was as to the authority of a certain synod in South Africa and when their Lordships say (*vide Long v Bishop of Cape Town* [3]) that "the members of the Church of England where there is no Church established by law may adopt, as members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them," the Board was explaining that in such cases a Church, in the broad sense of the word, can be constituted by persons who agree to form a new religious association. This is made abundantly clear in the later case in 1882 where

1. (1863) 1 Moo. P. C. (N. S.) 411 2 (1882) L. R. 7 A. C. 484,
3. (1863) 1 Moo. P. C. (N. S.) at p. 461.

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their Lordships repeat the same language with reference to the Articles of the Constitution of the Church of South Africa framed in 1870 which in the opinion of the Board substantially excluded portions of the faith and doctrine of the Church of England (*vide* page 509). Nothing could be farther from the intentions of their Lordships than the suggestion that where there is a recognised religious association such as the Roman Catholic Church under the supreme authority of the Pope at Rome, persons who become members of that body at a particular place can, in respect of their local Church, derogate from the authority of the rulers of their community by any agreement made among themselves or adopt rules for the conduct of ceremonial observances at variance with the canons of the Church. To do this they must secede from the Roman Catholic Church and form a new religious association for themselves as was done by the Church of South Africa and by the great voluntary churches in England; but having so formed a new Christian Church they would be as much bound by its articles of constitution and be as powerless to vary its rules so as to accord with local wishes, as are the congregation of the Church of England as by law established in England. These rules are in the language of the Board quoted above "binding on those who expressly or by implication have assented to them and no stronger implication of assent can arise than the admission into the fold of the Church by baptism and the submission to its tenets by acceptance of its sacraments. Mr. Rangachariar has argued that it is open to the Courts to decide questions in dispute between the laity and the clergy, and the District Judge was in error in holding that the claims in this suit being unconnected with an office could not be adjudicated on and he relied on the decision of the Board reported in *Brown* v. *Cure, etc., De Montrial* [1]. I entirely accept the proposition that a member of a Church need not sue by virtue of an office but the difficulty still remains as to what alleged injuries are cognizable by a Court of Law. Whatever they be, however, the authority relied on is fatal to the appellants' case on the question of the material to be examined. Their Lordships say on p. 207, that when a complaint is made by a member "that he has been injured as to his rights in *any matter of a mixed spiritual and temporal character* the Courts have power to enquire into the

1. (1879) L. R. 6 P. C. Appeals 157.

laws or rules of the Tribunal or Authority which has inflicted the alleged injury". Assuming for the present that there is any allegation in the plaint of action by defendants 1 and 2 inflicting on the plaintiffs such injury as a Court will take cognizance of—a matter on which I have the gravest possible doubts—there can be no question, on the authority of the three cases in the Privy Council, that we cannot go outside the Canon Law to ascertain what are the rules which are binding on the plaintiffs as members of the Church. The claims are to introduce into a Christian Edifice their practice as to pollution and thus insist on a right to be kept from contact with a lower caste, to dictate to their clergy who shall and who shall not assist the priest in the ceremonial, and to control the arrangements for festivals, processions and custody. With regard to the 1st, it is hardly necessary to say more than it contradicts the fundamental doctrine of Christianity and is at variance with the universal practice in Catholic Churches where daily persons of every degree mingle in their worship. The plaintiffs rely on the practice of a great Roman Catholic Missionary Father De Nobili in the early part of the 17th century (*vide* a life of him Ex. H (4)) in adopting Brahman dress and manners and in sanctioning them among his converts, but it is to be remembered that De Nobili's mission was to Brahmans alone and that he failed in his efforts just as his successor 150 years later Abbe Dubois has confessed failure. It is true that Pope Gregory XV supported De Nobili by "according to caste converts the Cord, Kudumi, Sandal paste and purification of the body" (*vide* Ex. H (4) p. 27) ; but it is not suggested that the Pope in thus permitting the recognitions of caste has ever sanctioned such claims as are made in this suit. Certain directions are stated to have been given by the Holy See at a later date on this point (*vide* extract in Ex. H p. 529 a work which apart from such extracts has no authority) but they say nothing more than that the people are not to be persuaded to renounce their usages, customs and manners "*provided that they be not most evidently contrary to Religion,*" an exception which clearly covers a claim to assert caste—pollution in a Christian Church against the orders of the Bishop. In Ex. K a life of Bishop Canoz, the writer of Exs. VI and F written by a member of the Society of Jesus, the author speaking of the construction of the Church says on page 293 the Vellalas desired that the plan "should assign to each caste a separate

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part and Monseigneur Canoz "*ad Duritiam Cordis et Pro bono Pacis*" sanctioned it" and the diary of the Parish Priest bears testimony to the grief of the Bishop at having to make this concession. This concession has now developed into a claim that there are two Churches belonging to each caste separately—a claim which has never received the sanction of the Bishop at the time. There can be no doubt that in his desire to see the new Church built, the Bishop shut his eyes to the real foundation of a claim so inconsistent with his faith, in the delusion that time would remove the discord—a hope that has been falsified by the quarrels of the parties from that day to this. It was, however, within his powers to allot the sittings in the Church as appears from a collection of the decrees on the *Congregationis Sacrae Rituum* made in 1856 and published in Rome which has been filed as Ex. X. Each paragraph contains the questions propounded from a diocese and the ruling by the Council on it. Nos. 256 and 1413 on pages 58 and 248 respectively contain decrees laying down that the Bishop has the right to arrange the seating in a Church at his absolute discretion, and there can be no doubt that in sanctioning the plan in 1854 and in permitting the separation of the castes in 1872 and 1877, the Bishop purported to exercise a power vested in him at his absolute discretion. The like power has now been exercised by the 1st defendant in forbidding that separation. It is contended for the appellants that sanction having once been given could not be revoked, that is to say, that the Bishop in issuing directions within his power binds the successor in the diocese for all time. This proposition is in direct conflict with the view expressed in a treatise on Canon Law, a work of high authority by Cardinal Zitelli revised and enlarged by Doctor Solieri, Professor of Canon law in the Pontifical Institute of the Propaganda of the Faith published in Rome in 1907. It opens by dividing the members of the Church into Clergy and Laity and lays down the broad proposition that it is the province of the former to exercise the Government in the Church and of the latter to submit to the power of the former. At page 191, paragraph 251 dealing with the episcopal power of legislation, there is a passage so pertinent to the question in issue in this case that I think it necessary to extract it in full.

Page 191 *para.* 1 *No.* 251:—Being the Pastor and Prince of his diocese, the Bishop has within the sphere of his jurisdic-

tion everything that pertains to the Legislative power. He can enact for his diocese laws pertaining to his office which is to preserve and promote Divine worship and to feed the sheep entrusted to his care, so as to direct them to the ecclesiastical end. The Episcopal laws, however, should not have a sanction too heavy and passing the bonds of moderation. From this, his legislative power, results for him the right to change, to abrogate, to relax by dispensations both his own laws and the laws of his predecessors provided they have not been confirmed by an authority superior to his *e. g.*, the Roman Pontiff or by his own oath. An oath taken by his predecessors would not bind him. From the same power results also the right to abrogate the particular customs of his diocese if they be obnoxious to the good of the Church.

Mr. Rangachariar has sought to find limitation to this extremely definite pronouncement in the words that immediately follow the above quotation. They have been translated and filed as Ex. N, and are as follows:—"In which matter however he should act prudently especially if there be any right of a third party which may suffer prejudice". This obviously is no limitation (1) as it is only a warning to the Bishop and (2) because as between the Bishop and his flock, the latter are not "a third party". The next passage is also relied on. "He cannot abrogate universal customs" (I think "practices" would be a better and more accurate translation) because they are such as pertain to a common right. The suggestion put forward is that the rights claimed in this suit are *Universales Consuetudines* and come under the phrase *Ad Jús Commune pertinent*. The argument ignores the meaning of the whole passage. A clear distinction is made between *particularis consuetudines suae diocesis*, and *Universales Consuetudines* and the meaning is obvious. If a certain practice is a universal practice of the Church, obviously it could not be in the power of the Bishop to abrogate it within the limits of his jurisdiction. But where any particular practice has been authorised either by himself or by his predecessor for his diocese, it is clear beyond doubt on the above language that he has power to modify or abrogate it. Reliance is placed on another passage at page 91 which is also extracted in Ex. N. "As all practices are not in the knowledge of the chief in such cases, his consent, presumed but of legal efficacy, is sufficient, because in Canon Law as well

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as in other law, all rational practices sanctioned by sufficient length of time are naturally approved of by the chief. (This is not the translation filed as Ex. N, but is I think more accurately expressed in English). Here again there can be no real doubt as to the meaning of the passage and it does not support the argument of the appellant. It follows a passage in which the assent of the chief is stated to be *required* for all practices and provides for presumption of consent. It has, of course, no application where the Bishop has, with full knowledge, abrogated the particular practice. Several other passages have been extracted from this book on behalf of the appellant and are quoted in Ex. N. They have not however been relied on and an examination of them shows that they deal with customary right in Civil Law and wherever necessary a distinction is drawn between Civil Law and Ecclesiastical Law. There are others which are directions and advice to Missionary Bishops prescribing the powers of Vicar Apostolic. None of them are of any assistance to us in determining this question. On this point as to the power of Bishops, I do not think it necessary to examine the evidence any further; the passage at page 191 of the treatise being so clear and definite that it is fatal to the whole of the plaintiffs' claims. It is almost inconceivable that the congregation of the Church should think that they have the power to forbid their Bishops employing a member of a particular caste to assist him in the conduct of the service and the ceremony of the Mass. My learned brother in the course of the argument pointed out the absurdity of this contention. As to the claims of keeping the Church door and ringing the bells and other like matters, it appears on the evidence that there is an official called a Sacristan who has charge of these matters and even if there were not, they obviously are matters in which the priest, subject to the Bishop's control, must have full discretion. I am, therefore, of opinion that the whole claim whether founded on agreement or custom fails both on the facts and on law. We are told by Mr. Rangachariar that the decision against the claims of the plaintiffs may have serious consequences, *viz.* these people will leave the fold of the Roman Catholic Church. That is a matter which we cannot take into our consideration. We have only according to the law laid down by the Privy Council, to ascertain who are the persons having authority over such matters and by what rules they are bound. Applying this

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test, it is clear to me that the plaintiffs' suit must fail and this appeal must therefore be dismissed with costs.

Sadasiva Aiyar, J.:—As my learned brother has fully set out the pleadings and dealt with the facts in the Judgment just now pronounced by him, it is unnecessary for me to set them out in detail. The plaint in the suit in spite of (or because of) its length is rather vague as to the foundation of the plaintiffs' case. After careful consideration, I think it must be taken as based on the Bishop's Epistle of May 1877 referred to in paragraph 13 of the plaint. The first sentence in paragraph 14 is "from that time, the high caste people of the plaintiffs' *vagaira* and the low caste people of the *vagaira* of defendants from No. 3 have been acting in accordance *with the agreement termed as Epistle above.*" The next paragraph 15 is as follows:—"The rights which have accrued as mentioned above to the Pillais and Mudalis of the *vagaira* of the plaintiffs in respect of the suit Church have become established to the high caste people of the plaintiffs' *vagaira* not only on the ground of title but also by prescription and enjoyment." (That is, I take it, prescriptive enjoyment from the date of the alleged agreement of 1877).

This Epistle which is said in the above paragraph 14 to be an agreement binding on all the three parties, namely, (1) the plaintiffs' faction, (2) the faction of the defendants from the third defendant downwards and (3) the ecclesiastical authorities represented in this suit by defendants 1 and 2, is Ex. F in the case. The third paragraph of Ex. F is as follows:—"In accordance with the agreement made by the Pillaimars, Mudaliars and Nadars with the vicar of the Parish when the construction of the Church was about to be begun, all the Pillaimars and Mudaliars and such other castes as sat with them in the old Church must be along with them in the southern half of the Church, and all the Nadars together with such castes as sat with them in the old Church, must be with them in the northern half of the Church. Of whatever castes they may be, they must approach the communion table at the respective railings before the altar. Similarly also for the solemnisation of marriages and the performance of other requirements." (The beginning of the construction of the Church was in 1854). The note to Ex. F is as follows:—"To prevent as far as possible the recurring of the deplorable disputes that desolated the Christian congregation of Vaddakankulam, I

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exhort our fathers to get this regulation faithfully observed and not to favour in anything the pretension of the rival castes. All our Christians should be well persuaded that henceforth things will go as we order it by the present order. This will be the way of preventing the endless claims which would not fail to be raised on all sides on the day on which they would again discuss the conditions of this peace which has cost so much. "*Toute reserve faite de notre autorite.*" The Epistle with the note was entered in the register of the Church, Ex. 16.

I do not think that Ex. F can be treated as an agreement at all between the three sets of parties. It is only an order of the then Bishop to the worshippers at the Church to conduct themselves as directed by him in this Epistle and one of the motives for issuing that order was because the Bishop thought that the two sets of worshippers had entered into an agreement or arrangement in 1854. As the suit is based upon an alleged agreement of May 1877 (miscalled, according to the plaint, an Epistle) and as the Epistle F is an episcopal decree and not an agreement, the suit fails on the short ground that the foundation for the suit has not been established.

I shall assume, however, that the plaintiffs can fall back on the alleged agreement of 1854 referred to in paragraph 3 of the Epistle Ex. F. It is rather doubtful whether the statement about the alleged agreement is relevant evidence as it cannot come under Cl. 4 of S. 32 of the Evidence Act, it having been made long after the controversies had arisen between the two factions. It does not also come under Cl. 2 as it cannot be said to have been made in the ordinary course of "business" by the Bishop. Clearly, Cls. 1, 3, 5, 6 and 8 of S. 32 do not apply. It may perhaps be relevent under clause 7 which refers to statements relating to a transaction mentioned in S. 13 (*a*). Taking it then to be relevant evidence under Cl. 7 of S. 32, it is evidence of a very weak character. Bishop Canoz was then being worried with the "deplorable" and "recurring" disputes between the two sets of worshippers. He refers to a previous Episcopal decree of July 1872 and he says that "the devil which is an enemy to all good things in order to ruin the souls of worshippers eternally played his fraud and made them not to abide by" his decree of 1872. Ex. D, the draft of an agreement prepared in 1854 was not signed by any Pillaimar, Mudaliar or Nadar and

it is clearly erroneous to call it a concluded agreement and Father Canoz's reference to a concluded agreement of 1854 seems to have been intended more to justify his decision to his doubting mind than as an accurate and reliable statement of fact. That the terms of his draft prepared in 1854, were not accepted in their entirety by the Bishop when he issued his decree of 1872 is admitted. That many Nadars refused to be parties to any agreement recognising the claims of the Vellala and Mudali faction is clear from Ex. VII. That Father Canoz's decree Ex. F of 1877 was not treated by his successor (the 1st defendant) as binding on the Episcopate is shown by Ex. 20 where the 1st defendant modified some of his predecessor's directions as contained in Ex. F.

Again let us assume that there was a concluded agreement in 1854 between the two sets of worshippers as to the right to occupy seats in the Church to be thereafter built. How can such an agreement be binding on the ecclesiasticial authorities ? They are the legal owners of the Church premises. Even the incomplete document Ex. D refers to the "order" of the Parish Priest and does not say that the Parish Priest was a party bound by the contemplated agreement. Again the Parish Priest has no right to make any such agreement with the worshippers so as to bind the Bishop of Trichinopoly or His Holiness the Pope in whom the Church buildings became vested as soon as they were consecrated to the worship of God according to the tenets of the Roman Catholic Church. Assuming (without deciding) that the Bishop can bind himself personally during the tenure of his office to allow the Vellala faction the exclusive use of the southern wing. I have not been shown any authority for the proposition that he can perpetually bind the Roman Catholic Church or his successor by any such agreement relating to the Church property. I am clear that it would be a breach of trust on his part to grant any such perpetual license to a particular set of worshippers. In fact in 1896, the 1st defendant, by using the following expressions in Ex. 20, namely, "We hereby *by our own authority*" (or during the period of his own bishopric) "put it in force and we order that no one should make any alteration *without our permission*" clearly asserted that Ex. F was not binding on him or upon the worshippers except to the extent that he himself affirmed, ratified and re-issued the same.

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Then there is the larger question whether certain Roman Catholic Christians styling themselves as belonging to particular castes can by an agreement bind the succeeding generations of Christians alleged to belong to the same castes.

Almost all the members of the communities professing to follow the Hindu Religion belong to definite castes. The children of such caste-people (unless they become apostates or are excommunicated) are, by their very birth, members of their parents' respective castes. Many of the Hindu caste-communities living in defined localities recognize certain persons as the spiritual heads of the respective castes. Some few castes recognize also the authority of local head men or of local caste panchayats to enforce caste-discipline and to administer caste properties and the caste charities. In *Suppan Asari and others* v. *Vannia Konar and others* [1]. Sankaran Nair and Ayling, JJ., state that a caste can be recognized for the purpose of acquiring rights to property and easements by prescription as if the members of the caste formed a corporation owning civil rights. Then the learned Judges say:—"The cases show that properties are purchased for the caste and by the caste. Their right to hold and manage property has been recognized. Courts have often given effect to the resolution of the caste as a body as to the management of property. Suits have been brought on behalf of caste and against caste."

Now the identity of a Hindu caste as a unit is preserved (*a*) by the almost total exclusion of any accession from outside, that is, by confining accessions to its members to increases by births (*legitimate* births except in very few cases like the children of dancing girls) and (*b*) by confining valid marriages to persons belonging to the same caste. Now it is almost impossible to impose such restrictions on the so-called caste Christians because restrictions as to intermarriage (other than restrictions as to incestuous connections and bigamous connections) cannot be legally recognized among Christians. Suppose that some Brahmin Hindus become Roman Catholic converts and settle in the plaint village, can the Pillaimars and Mudaliars prevent them from using the southern wing and can the Nadars and the other converts who sit with them (like Pariah Christians) prevent the new converts from occupying the northern wing? Supposing

1. (1914) 27 M. L. J. R. p. 110.

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the Bishop or the Parish Priest appointed to the Church was a Nadar or Panchama convert, can he be prevented from going into the southern wing or getting up the chancel for fear of polluting that wing or part of the Church by his presence? Can excommunication of a Pillai Christian from caste by the vote of the community because he dined in a Shanar's house be recognized by Courts and can Courts prevent such a Christian from using the southern wing because those who excommunicated him were afraid of pollution by his contact? Supposing a Nadar Christian male marries a Vellala female and children are born and baptised into the Roman Catholic faith or suppose an excommunicated Brahmin female gives birth to illegitimate children by unknown fathers and they become Roman Catholic converts and settle in this Parish, to what caste are they to belong and in what wing of the Church are they to be made to sit? To recognize castes among Christian communities as distinct corporations with exclusive legal rights as caste corporations would lead to complications and anomalies of such a far-reaching character that I am not prepared to extend the recognition by Courts of Hindu castes as distinct corporations for certain purposes to so-called caste Christians. It follows, therefore, that the alleged agreement of 1854 even if it is established, cannot bind any other persons except the particular individuals who entered into that agreement, assuming that it would bind even them as individuals. That alleged agreement being more than 60 years old, very few, if any of the parties to the agreement, can now be living. (Of the parties named in the plaint, I find only 5 could have been born then and as all of them must have been boys or children at that time, they could not have been parties to the alleged agreement.)

In the Kamudi temple case *Sankaralinga Nadan and others* v. *Rajeswara Dorai* [1] the learned Subordinate Judge excluded Hindu Nadars from access to a particular temple on the ground that the temple itself would be polluted according to the Hindu ecclesiastical law by the admission of Shanars, into it. The Madras High Court also referred to the entry of Shanars, Pallars, Pariahs and Chucklers into the temple as causing pollution and to the Shastras prohibiting the Shanars from so entering the temple. Their Lordships of the Privy Council (through Lord Robertson) make the following observations in their

1. (1908) I. L. R. 31 M. 236 s. c. 18 M. L. J. 387.

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Judgment—"It is alleged by the respondents that the presence of persons belonging to the appellants' caste is repugnant to the religious principles of the Hindu worship of Shiva and to the sentiments of the caste Hindus who worship in this temple, and that it is contrary to custom in this temple. * *
The controversy touches, but does not involve delicate and abstruse questions of Hindu religious doctrine. * *
The argument addressed to their Lordships was directed rather against the soundness of the doctrine asserted by the respondents as involving the exclusion of Nadars, and it was endeavoured to show that there were inconsistencies in the respondent's treatment of the appellants in other respects. All this, however, as a matter of theological argument, is too rationalistic; while, on the other hand, it wanders from the region of fact and custom. What the respondents have succeeded in proving is that by custom the appellants *are not among the people for whose worship this particular temple exists.*"

Thus their Lordships have clearly indicated that what the Courts have to see is whether a particular place of worship was not intended for the benefit of any particular people and if (by the evidence of usage) it is so established, Courts should negative the claims of such people to worship therein. In the present case, it cannot be alleged for a moment that the defendants from the third defendant downwards are not persons for whose use the plaint church was built. The Bishop and the Parish Priest acting under the Bishop's directions have uncontrolled authority in regulating the seatings in the Church and in the conduct of ceremonies and festivals within the Church enclosure. That authority was never given up and could not be legally given up according to the Canon Law which is binding on the parties to this suit. In "any matter of a mixed spiritual and temporal character, the courts have power to enquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury." Now injury by pollution to lawful worshippers in a Hindu temple or to the image in the temple through the presence of people belonging to castes below the fourth caste (known as polluting castes) is a matter of "mixed spiritual and temporal character." But the sentiment of pollution in a Christian Church indulged in by so-called caste Christians is neither spiritual nor temporal injury and it seems to me rather brazen to ask a Civil Court to recognize it as a legal injury giving rise to a civil casue

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of action. The bad usage, never accepted as lawful or invariable by the Shanars, by which in this Church finished about 40 years ago, they have been usually confined to the northern wing cannot be recognised as a reasonable custom having the force of law.

> "*Justice and Truth with Custom's hydra brood*
> *Wage silent war*"

and custom, though not reasonable, sometimes wins in Courts of Justice when buttressed (as in the case of many Hindu customs) by theological writings whether genuine or spurious. The usage relied on by the appellants in this case cannot make a shadow of claim to even such theological buttressing up and Mr. Rangachariar's attempts to quote one or two ancient Roman Catholic Ecclesiastics in favour of his clients failed utterly.

Mr. Rangachariar in the course of his arguments referred (without dealing elaborately with the matter) to the prescriptive right to occupy pews and seats in the churches consecrated for divine worship by the Church of England as furnishing an analogy in support of the right claimed by the plaintiffs. In the first place, I am instructed by my learned brother that the system of enclosed seatings called pews does not obtain in Roman Catholic Churches and I think that this one fact makes the analogy sought to be relied on by Mr. Rangachariar largely inapplicable to this case. A right to a pew can only be acquired by faculty or prescription, the long user necessary to establish prescription being held to be evidence of a lost faculty. Now, a faculty is "a privilege or special dispensation granted to a person by favour and indulgence to do that which by the law he cannot do." It seems to me that favours and indulgences granted by one ecclesiastical authority (say, a Consistory Court representing the Bishop's ancient ecclesiastical jurisdiction) can only be interfered with by himself or by the appellate ecclesiastical authorities (the Final Appellate Court being the Privy Council). A Civil Court must of course recognise the favour or indulgence granted by the proper ecclesiastical authority when temporal or mixed spiritual and temporal rights flowing from the favour or indulgence are interfered with by wrong-doers. But it seems to me that Civil Courts cannot interfere with the jurisdiction of the ecclesiastical authorities in the grant or revocation of such favours and indulgences. A grantee of a favour or indulgence can make no claim against his grant or that the favour or indulgence should be treated as irrevocable unless the grantee can invoke the doctrine of estoppel in his favour,

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"In the English Church before the Reformation, no seats were allowed for the use of parishioners in a Church" except in private chapels. "After the Reformation, any question as to seats in the body of a Church was to be decided by the 'ordinary' because the place is common to all the inhabitants and it belongs to the Bishop to order it so that the service of God may be best celebrated and that there be no contention." The duty of Church-wardens under the Bishop's control is "to provide to the best advantage for the accommodation of all parishioners so that as far as practicable every one may have a seat and they are bound not to accommodate richer classes beyond their real wants to the exclusion of their poorer neighbours." (Halsbury Vol. 11, page 740). I have no reason to believe that the Canon Law governing Roman Catholics is based on different principles so far as the right of the parishioners to seating accommodation in the Church is concerned. "By the common law, there is no property in nor any right to sell or let a seat in the body of a parochial Church or chapel." Such rights in English Churches seem to have been introduced mostly by private Acts of Parliament in derogation of the wholesome common-law rule. In *Claverley Vicar, etc.* v. *Claverley Parishioners, etc.* [1] Sir John Nicholl's remarks in an old case are referred to. Those remarks are to the effect that in former times faculties for pews had been granted with too great facility and "they ought to be granted thereafter with the greatest prudence and circumspection." In the Roman Catholic Church now in dispute, there are no enclosed seats or pews. The body of the Church consists of two wide expanses of sitting accommodation. It has been held so long ago as in 1612 (in Corven's case) that Church-wardens and Bishops "cannot make an irrevocable assignment of seats or divest themselves or their successors of the power of making necessary changes whenever circumstances render it desirable." Further "the parishioners to whom seats are assigned have no right to exclude others if they and their family do not occupy the whole." (Page 471 of Halsbury's Laws of England Vol. 11.) It seems to me therefore that the analogies derivable from the English Ecclesiastical Law relating to seats in Churches are rather against Mr. Rangachariar's contentions than in their favour.

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1. L. R. (1909) P. D. 195

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The plaintiffs in this case do not allege that they were refused necessary sitting accommodation in the Church or that they were made to give up their seats for others after they had lawfully seated themselves. Their bold claim is to compel the ecclesiastical authorities to refrain from giving available seats in the southern wing to Christians whom the plaintiffs consider to belong to polluting castes and also to restrain the Nadars, etc., from occupying such available seats. The plaintiffs have, of course, given up the Hindu orthodox notion that the touch of a European is polluting (as they receive with unction holy water and sacramental bread, etc., from the European priests and bishops) but have retained that sentiment as regards their fellow-Christians of Indian nationality.

It is natural that I should feel a greater sense of freedom in dealing with modern undesirable innovations in support of alleged rights to exclude certain classes of worshippers from a Hindu Temple and in respect of squabbles over honorary precedence in Hindu temples than when dealing with similar disputes in a Christian Church. See *Athan Sadagopachariar Swamigal* v. *Elayavalli Srinivasachariar* [2], and *Gopala Moopanar* v. *Dhurmakarta Subramania Iyer* [3]. I have therefore not yielded to the temptation I have felt to express my views on the system of pews in English Churches. Nor shall I say anything on the policy of some of the Roman Catholic ecclesiastics of a by-gone generation in partially recognising caste sentiments and scruples among their converts as a matter of expediency rather than of principle. It is very difficult to describe the plaintiffs' faction as a class recognizable with reasonable definiteness as they are the descendants of Hindu converts who belonged to at least two Hindu sub-castes namely, Vellalas and Mudaliars. I find also that there are references in the documents to other castes who have been sitting in the southern and northern wings respectively as they belonged respectively to the touchable castes like the plaintiffs or the non-touchable castes like the Shanars. The plaintiffs cannot invoke (like the Hindus) the sanction of accepted sacerdotal texts (whether genuine or spurious) for perpetuating the distinction (and that, in God's House) between human beings during a particular life period by reason solely of birth as touchables and untouch-

1. L. R. (1909) P. D. p. 195.
2. (1913) M. W. N. 289.
3. (1914) 27 M. L. J. 253=(1914) M. W. N. 822.

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ables. While even among Hindus the strength of this distinction and of the alleged religious sanction therefor is according to competent authorities being weakened in these days through the effects of several unifying causes, it is difficult for one to sympathise with the efforts of so-called caste Christians to obtain legal sanction for alleged customs among them tending in the opposite direction.

In the result I agree with my learned brother that the appeal should be dismissed with costs.

PRIVY COUNCIL.

Present:—Viscount Haldane, Lord Parmoor, Sir John Edge and Mr. Amir Ali.

(On Appeal from the High Court at Bombay).

Haji Umar Abdul Rahiman ... *Appellant**

v.

Gustadji Muncherji Cooper ... *Respondent.*

P. C. — Haji Umar Abdul Rahiman v. Muncherji Cooper.

Practice-Variance between pleading and proof—Suit on promissory note—Date of—Variance, in trial—Principle one of circumstances, not of law.

Where in a suit on a promissory note purporting to be of a particular date the evidence showed that it was executed on some other day and the trial court acting upon that evidence gave a decree to the plaintiff but the High Court reversed the judgment laying stress on the principle that it would introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded on inferences at variance with the case that the plaintiff has pleaded and by joining issue in the case, has undertaken to prove, on appeal to the Privy Council.

Held, reversing the Judgment of the High Court that the principle relied upon was in ultimate analysis one of circumstances and not of law and in applying it, the whole of the circumstances must be taken into account and carefully scrutinised and that the High Court had applied it in an abstract and unsatisfactory way which had misled them in estimating the merits in the controversy before them.

Appeal from a Judgment of the Bombay High Court (*Scott, C. J.* and *Chandavarkar, J.*) reversing a Judgment of the Subordinate Judge of Poona.

The facts are fully stated in the Judgment.

De Gruyther, K. C. and *Raikes* for Appellant.

Sir Erle Richards, K. C. and *Sir William Garth* for the Respondent.

The Judgment of their Lordships was delivered by

Viscount Haldane:—This is an appeal on questions of fact from a Judgment of the High Court of Bombay, reversing the Judgment of the First Subordinate Judge of Poona, who tried

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* 22nd November 1915.

the case. The principal issue is whether a promissory for Rs. 15,000, on which the appellant brought an action against the respondent was a forgery. A good deal of the oral evidence was taken, not by the Trial Judge, but before another Judge who acted for him. The case is, therefore, not one in which a Court of Appeal has the full assistance of the impressions of a Judge who in trying the case has seen all the witnesses in the box. The High Court and this Board have had to weigh as recorded for themselves, with the aid of the views of the Trial Judge on those occasions on which the witnesses are examined and cross-examined before him.

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The appellant was a furniture dealer and a money lender at Poona. The respondent was a book-maker on the turf, who also owned a fibre factory. The latter had frequent occasion to borrow money, and he borrowed from time to time from the appellant among others. Between the *diwali* day in November 1906 with which the native financial year commenced, and the 5th November 1907 which ended that year the respondent had borrowed from the appellant on promissory notes sums amounting to Rs. 19,000. Of this debt he had repaid Rs. 5,000 in August and Rs. 14,000 for principal remained unpaid on the *diwali* day in 1907, the 5th November, together with Rs. 332 for interest. As to the security for this indebtedness there has been dispute. A good deal of the money had been advanced for the purposes of building a bungalow on some land at Poona belonging to the respondent, and the evidence of the appellant was that the title deed to this land had been deposited with him as security for the advances, with a promise of a formal mortgage when his building was complete. However, on the 9th March 1907, the respondent got the deed back for the purpose, as he stated in a letter of that date, of showing it to his pleader, and on a promise to return it. He either did not return it, or if he did so he managed to get possession of it again, and he used it to enable himself to mortgage the property in August for Rs. 15,000 to a Dr. Modi. The appellant was not informed of this and after discovering it he brought the action in which this appeal arises to recover the amounts due for principal and interest, and for a declaration that these amounts were charged on the property. The contention of the respondent was that he had never agreed to give the appellant a mortgage but had only negotiated about

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it. It is, however, difficult to reconcile this version of the transaction with the terms of the letter of 9th March in which he appears to treat the appellant as entitled to have the deed.

It is clear that the respondent had been borrowing on a large scale prior to November 1907 from other people as well as from the appellant. Indeed his case is that he so borrowed in order to pay off the latter. But he appears to have been in circumstances of some difficulty. He had sometime previously been declared a defaulter by the local Turf Club, a circumstance which could not but cause him difficulty in borrowing. However, his case is that he succeeded in raising enough money to pay the appellant in cash, two sums of Rs. 14,000 and 1,000 on the 5th of November, in small notes of Rs. 100 and less. An important question which has to be determined is whether he did this, or whether the appellant merely closed the account for the year by taking a fresh promissory note from him for the balance carried into the new account.

Their Lordships have had before them a translation of the account kept in the books of the appellant, relating to his transactions with the respondent. From the translation it appears that the Rs.14,000 were credited as "in cash in full settlement of the account up to this day", *i.e.*, the 5th November 1907. At first sight this would seem to mean that the money was actually paid. But an examination of the accounts made out in previous years, shows that the expression "in cash" is far from conclusive, inasmuch as it was the regular practice to enter as sums of cash received and credited the amounts of new promissory notes given by the respondent to the appellant in liquidation of earlier notes, just as though actual cash had been received. Their Lordships think that it must be taken that the practice was to close each yearly account entirely by treating any debit balance as paid off when there was credited as liquidating the cash balance due, a new promissory note which then became a debit item in the account for the ensuing year. They are confirmed in this view by what was said by the Trial Judge to the effect that he had had a long experience in which he had been familiar with the existence of this practice.

The appellant and his witnesses swear that this was the course adopted when the account was closed on the *diwali* day of 1907 and a new account opened for the ensuing year. The respondent swears that he paid the Rs. 14,000 in cash, consisting of

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small notes which he got, not from his bank but from his house, where the money had been kept ready for three months. Their Lordships think that the probabilities are against the truth of this statement. The respondent had been borrowing money during this period, including a large sum of Rs. 15,000, as late as August from a Dr. Modi, and he had had an execution issued against him for a judgment-debt of Rs. 8 000 in October. This debt he had paid, but he says in his evidence that in order to do so he had borrowed Rs. 5,000. Besides this he had incurred other debts, For instance he had borrowed Rs. 1,000 from the appellant on 3rd September. This state of his affairs does not render it probable that he was in a position to keep Rs. 14,000 or any other considerable sum in his house during the three months antecedent to the alleged payment of cash to the appellant. Again the body of the promissory note on which the appellant sues is in the handwriting of the person who signed it, and the handwriting in the case both of the body of this note and its signature appear indistinguishable from the admitted handwriting of the respondent. Indeed the Trial Judge came to the conclusion on a comparison of documents and after taking evidence, that the signature was genuine. Further, subject to one important discrepancy which their Lordships will presently deal with, the appellant's books bear out his assertion that the balance was liquidated by means of the promissory note. The respondent ought in ordinary course to have in his turn produced his books to show the entries made by him at the time and so bear out the case of cash payment which he made. In addition to his business as a book maker he had, as already stated, a factory. His excuse for not producing the appropriate books was that they had been destroyed in a fire which took place at the factory on 10th and 11th November, just after the transaction in question. He said that two books only had escaped destruction, but it appears that the entries in neither of these related to the transactions in question. As against this testimony the appellant called one Cawasji, who was agent for the insurance company from which the respondent recovered the amount of the damage caused by the fire. Cawasji said that he had produced to him by the respondent books other than the two referred to, including a cash book. The evidence taken renders it very doubtful whether the room in which the books were was destroyed at all by the fire. Their

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Lordships cannot accept the story told by the respondent about the destruction of his books.

But, on the other side, the case made by the appellant was in its turn unsatisfactory. The promissory note on which he sued was for Rs. 15,000, being made out for the balance of Rs. 14,000 and Rs. 332 for interest due, the remainder being stated to have been paid in cash. But the note was dated, not on the Diwali day, the 5th, but on the 7th November. The appellant and the witnesses whom he called insisted throughout that the date of the transaction was the 7th, and that the note was signed then. They produced books which supported this statement. These books showed the Rs. 14,000 as paid in cash on the 5th November and the debit for Rs. 15,000 on the promissory note as made under date the 7th. But the respondent succeeded beyond question in completely disproving the allegation that he had signed the note on the latter date. He established conclusively that he was in Bombay and not in Poona on that day. It was not until this evidence had been given that the appellant's solicitor suggested in his reply that the date of the disputed note and the date assigned by the appellant for the transaction might have been a mistake and that the note was post-dated and really signed on either the 5th or the 6th.

The Trial Judge took the view that the appellant and his witnesses had perjured themselves about the date and that his books had been so fabricated as to support this story. But he held that the note was in fact signed by the respondent, and that the transaction had in reality taken place in the form alleged by the appellant, but on the 5th and not on the 7th. He considered that both parties had committed perjury, and to mark his sense of what had occurred, while deciding in favour of the appellant he deprived him of his costs.

The learned Judges of the High Court took a different view. They were of opinion that the Trial Judge's finding that the disputed note was signed on a different date from that alleged by the appellant in his plaint, and the evidence given constituted a fatal variance from the case pleaded and made. They thought that the receipt in the appellant's account on which the respondent relied, and by which the appellant purported to acknowledge receipt of cash in payment of the previous debt, was sufficient evidence of payment in cash as alleged by the respondent. They

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considered that the destruction of the respondent's books in the fire had been proved, and that there had been no suppression by him of facts. They thought that there was evidence that the respondent was in a position to have made the cash payment set up. As to the finding of the Trial Judge that the note was signed by the respondent, they thought that the handwriting was similar to the handwriting of the respondent in other promissory notes produced for comparison and admitted by him, but that this circumstance was not sufficient to rebut what they regarded as the inference irresistibly arising from the other proved facts in the case, that the handwriting was the work of a clever forger. They laid great stress on the principle that it would "introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded on inferences at variance with the case that the plaintiff has pleaded, and, by joining issue in the case, has undertaken to prove."

Their Lordships are of opinion that the High Court has applied this principle in an abstract and unsatisfactory way which has misled them in estimating the merits in the controversy before them. In applying such a principle the whole of the circumstances must be taken into account and carefully scrutinised. The question is in ultimate analysis one of circumstances and not of law. In the case which the Board has on the present occasion to consider the fundamental questions are whether the sum due was paid in cash, and whether the note was a forgery. No doubt the appellant was quite wrong in saying that the note was signed on the day on which it was dated, the 7th November 1907. On that date it is proved that the respondent was not in Poona, but he may have post-dated the note accidentally, or for some purpose, and have signed it on the 5th or 6th. It is going too far, in their Lordships' opinion, to infer, what the Trial Judge inferred, that the books must have been fabricated, and that deliberate perjury was committed. It is quite possible that all that happened was that the appellant and his witnesses, whose testimony was given a year and a half after the event, had not made out the accounts until some interval had elapsed, and were then misled by the documents into making a serious but not conclusive slip. The accounts in the appellant's books may quite naturally have been

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erroneously, but in good faith, based on the date of the note. The natural inference from the documents and the evidence appears to their Lordships to be that the signature was genuine and that the transaction, like the previous transactions, was not a closing of this account by the payment of cash, but was a liquidation by means of a fresh note. In the view that they take of the evidence what they have stated appears to them to be the proper inference from what is established by the evidence. They are unable to agree with the High Court either in their view of the evidence or in thinking that the general principle on which the learned Judges relied can be decisive of a case in which the cardinal issues are in reality those stated. Their Lordships are not called on to interfere with the discretion exercised by the Trial Judge as to costs, but they think that at all events on the main question he was right, and the High Court wrong.

They will, therefore, humbly advise His Majesty that the Judgment of the Court of First Instance should be restored, and that Respondent should pay the costs of this appeal and of the proceedings in the High Court.

Solicitors for the Appellant:—*Latteys and Hart.*

Solicitors for the Respondent:—*Downer and Johnson.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Chief Justice, and Mr. Justice Srinivasa Aiyangar.

T. B. K. Viswanathaswami Naicker ... *Appellant** (*Plaintiff*)

v.

Kamulammal and others ... *Respondents* (*Defendants 1, 3 to 7, 9 to 13, 15 to 22, and legal representative of the deceased 14th defendant*).

Viswanathaswami Naicker *v.* Kamulammal.

Hindu Law—Illegitimate son—Impartible estate—Separate property of Zemindar—Succession to—Illegitimate son, share in—Pannai lands—Extension of—Accretion to estate.

An illegitimate son succeeding to the separate estate of his father along with the widow is entitled to share equally with the widow.

Where lands within the Zemindari limits are purchased by the Zemindar and cultivated as pannai along with the other pannai lands of the estate, they become accretions to the Zemindar's interest in the Zemindary and pass on his death to the heir to the estate.

This appeal was heard on a former occasion by Miller and Abdur Rahim, JJ. (See *Viswanathaswami Naicker v. Kamulammal* [1],) when their Lordships remitted the case for findings on the following two questions:—(1) "whether any of the property in the suit and if so, what property is the separate property of the Zemindar and not part of the impartible Zemindari and if so, (2) To what share, if any, is the plaintiff entitled in it or any part of it,"

On the 1st issue as regards the properties claimed in the plaint which was not acquired by the late Zemindar or during his life-time, but were acquired during the time of the predecessors of the late Zemindar, the Subordinate Judge held that such properties descended as ancestral property to the late Zemindar and his step-brother Vadamalai Raj Pandya Nayakar who survived the former, and that on the death of the Zemindar those properties passed by survivorship to Vadamalai; so that the plaintiff who is an illegitimate son cannot claim a share therein. It was contended for the plaintiff that the said Vadamalai was born insane and was an idiot and was disqualified from inheriting. But the Subordinate Judge overruled the contention. As regards the properties acquired by the late Zemindar the Subordinate Judge purporting to follow the decision of the Privy Council in

* A. No. 118 of 1906. 9th August, 1915.

1. (1912) 23 M. L. J. 271.

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Parbati Kumari Debi v. *Jagadis Chunder Dhabal* [1], held that the defendant widow had not proved that the properties acquired by the late Zemindar were not incorporated with the impartible estate or were joint family properties. As regards pannai lands also the Subordinate Judge held that any extension of pannai by the late Zemindar either by reclamation or otherwise was also the separate property of the late Zemindar capable of partition between the widow and the illegitimate son.

On the 2nd question the Subordinate Judge found on an examination of the authorities that the illegitimate son was in a partition with the widow entitled only to one-third share of the separate properties of the deceased Zemindar.

" The persons entitled to share in this suit are plaintiff and 1st defendant. Plaintiff is therefore entitled to a one-third share.

To summarise my conclusions, I find that plaintiff is entitled to a decree for a 3rd share of the plaint properties described below *i.e.*, items 44, 52, 53, 61 to 113, 116 to 118, 120 to 127, 129 to 140, 146, 149, 151 to 177, 185, 217, 218, 221, 228 to 231, 247 to 249, 252, 254, 259 to 264, 285, 308 to 318, 322 to 324, 326, 328, 340 to 345, 348, 350, 352, 354, to 367, 371 to 379, 380 to 410 and 417 of schedule A, 1 to 7, 10, 13 to 22, 25 to 28, 30 to 49, 51 to 55, 58, 59, 61, to 68, 70 to 109, 111, 113, 114, 117, 120, 122 to 134, 137 to 139, 141, 142, 149 to 155, 173 to 179, 180 to 231 of schedule C and Rs. 59,276 in respect of the debts appearing in schedule D. He will have to give credit thereout to the share of debts which he has to discharge as noted above. He will further have to surrender the properties he obtained under Ex. II, schedule I. Note. It is not ascertainable if any of the above properties are included in Ex. RRRR (page 267.) If so they will have to be excluded in execution."

This Appeal and Memorandum of Objections came on for final hearing, after the return of the finding of the lower Court upon the issue referred by this Court for trial.

T. Rangachariar and *C. S. Venkatachariar* for the Appellant.

S. Srinivasa Aiyangar, K. V. Krishnaswami Aiyar and *T. V. Muthukrishna Iyer* for Respondents.

The Court delivered the following

Judgment :—The 1st question to be decided is whether the plaintiff as the illegitimate son of his deceased father is entitled

1. (1902) I. L. R. 29 C. 433 P. C.

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to share equally with his widow the 1st defendant or whether he is only entitled to half of her share *i. e.*, to ⅓rd of the properties. In a series of cases in Madras beginning with *Ranoji* v. *Kandoji* [1], it has been held that an illegitimate son succeeding to his deceased father along with a widow, daughter or daughter's son is entitled to half of the properties and not merely to one-third *Pravathi* v. *Tirumalai* [2], *Chinnammal* v. *Varadarajulu* [3], and *Meenakshi* v. *Appakutti* [4]. In *Rahi* v. *Govindu* [5], Chief Justice Westropp elaborately reviewed all the texts of Hindu law dealing with the rights of an illegitimate son and came to the conclusion (as we understand the judgment) that the illegitimate son was entitled to a half share of the properties; and in *Seshagiri* v. *Girewa* [6], Sargent, C. J. who delivered the judgment of the Court, took the same view and understood the decision in *Rahi* v. *Govindu* [5], as laying down the same rule. The learned vakil for the respondent invited us to construe for ourselves the original text of Mitakshara which he says is clearly in his favour. He also cited the commentary of Aparurka on the text of Yagnavalkya and the commentary of Medathithi, the well-known commentator of Manu on the same text. He further contended that all the text book writers on Hindu law who knew Sanskrit have construed the passage of the Mitakshara in the way he construes it. Much may no doubt be said in favour of this construction. But the decisions of this Court are not based merely on the interpretation of the text of the Mitakshara. In *Ranoji* v. *Kandoji* [1], in which the position of an illegitimate son was fully considered, reliance was placed on a passage from the Dattaka Chandrika which states in clear terms that the illegitimate son shares equally with the widow, daughter and daughter's son. It was this very passage of the Dattaka Chandrika which was relied on as authority for not excluding the widow from the succession when there is an illegitimate son, whereas the Mitakshara omits the widow from the category of persons who are not excluded by the illegitimate son. The Dayabhaga which gives the illegitimate son an equal share with the daughter and daughter's son was also referred to.

In this state of things, we are not prepared to depart from the course of decisions in this Court which hold that the plaintiff is entitled to share equally with the widow.

1. (1889) I.L.R. 8 M. p. 557.
2. (1886) I. L. R 10 M. p. 334 at p. 343.
3. (1892) I.L.R 15 M. 307.
4. (1909) I.L.R. 33 M. 226; s.c. 20 M.L J. 359.
5. (1875) I.L.R. 1 B. 97.
6. (1889) I. L. R. 14 B. 282.

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The next question is whether the last Zemindar's step-brother Vadamalai was disqualified by reason of insanity from sharing with his brother their father's separate property. Vadamalai, it should be mentioned, who was elder than the Zamindar but was the son of a junior wife, did not press his claim to succeed to the Zemindary in preference to his brother, nor did he after the brother's death claim the Zemindary against the widow. As regards the 1st point the respondents explain that according to the custom of Kumbala Zemindars the son by the senior wife succeeds to the Zemindary. As regards the separate property left by their father it is urged that there was no need for a partition as Vadamalai lived with his brother the late Zemindar in the palace, and after his death, went on living with his widow, the 1st defendant, whose sister's daughter he had married. These facts, it is suggested explain his conduct in not having put forward a claim to the Zemindary after his brother's death and at the time of the compromise between the widow and the more distant (reversioners). The mere fact that Vadamalai did not press his claim to the Zemindary is not, in our opinion, sufficient proof of insanity. On the other hand we have the fact that he gave evidence in Court in Original Suit No. 15 of 1891 and though subjected to a lengthy examination gave rational answers, and that he married and had issue. On the whole we think the evidence does not establish that Vadamalai was disqualified from inheriting. It follows, therefore, that the late Zemindar's share in his father's separate properties on his death passed by survivorship to Vadamalai and that the plaintiff has no claim to them. On this ground his claim to the properties mentioned in Ex. ZZZZZ also fails.

Item 55 of Sch. A the next item claimed by the plaintiff is a bungalow in Madura built by the Court of Wards during the minority of the late Zemindar at a cost of Rs. 60,000 on a site inherited by the Zemindar and his brother from their father. The 1st Respondent contends that either the bungalow became the joint property of the two brothers as the site was joint property, or that it was built as a town residence for the Zemindar and was intended to pass with the Zemindary, and that in either view the plaintiff's claim must fail. We agree with this contention.

The 1st respondent objects to items 61, 65 to 69, 73 to 76, 79 to 113, 116 to 118, 120 to 127, 129 to 138, 149, 151 to 177, 185,

221, 248, 249, 254, 285, 308 to 318, 322 to 324, 330 to 345, 348 350 to 352, 354 to 357, 359 to 366, 375 to 379, 63, 64, 371, to 374, 380 to 410, 62, 70 to 72, 77, 78, 139, 140, 146, 323, 326, 328, 356, 367, 217, 218, 228, 231, 252, 259 and 264, in this Schedule A which have been allowed to the plaintiff. They are lands within the ambit of the Zemindary and the Zemindar was entitled to the Melvaram therein. He purchased the kudivaram right in items 61 to 410 and succeeded to the kudivaram right in the remaining items on the death of his mother. All these lands were cultivated as pannai along with the other pannai lands of the estate. They are clearly properties to be held with the Zemindary, in fact they are accretions to the Zemindar's interest in the Zemindary. Following the decisions of this Court in *Lakshmipathi v. Kandasami* [1], *Ramasami Kamaya Naik v. Sundaralingasami Kamaya Naik* [2], and *the Ramnad case* [3] we disallow the plaintiff's claim to these items.

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The plaintiff also claims items 57, 69, 135 and 136 of Schedule C. Item 57 is a jewel usually worn by women. The 1st defendant swears that the jewel was purchased for her. Considering that at that time the 1st defendant was the only lady in the Zemindar's family who could have worn such a jewel we are inclined to believe her evidence and disallow the plaintiff's claim to this item. The respondent admits that the plaintiff is entitled to item 69. Items 135 and 136 are loose pearls and rubies and the 1st defendant claims them as her stridhanam. She did not set up this claim in Ex. K and there is only her evidence in support of her claim. We are not prepared to act on it. We therefore allow the plaintiff's claim to these two items.

The 1st respondent claims the cattle used for cultivating the pannai lands *i.e.* items 173 to 203 of Schedule C. The appellant admits that if the pannai lands are held to be part of the Zemindary he would not be entitled to a share in them. As we hold that the pannai lands are appurtenant to the Zemindary we disallow the plaintiff's claim to these items. The plaintiff admits that the 1st defendant is solely entitled to item 231 of this Schedule. The plaintiff accepts the valuation given by the 1st respondent for item 229, *viz.*, Rs. 1,300 and will be entitled to his share of this sum and not to Rs. 2,607 as claimed by him.

1. (1892) I.L.R. 16 M. 54. 2. (1893) I.L.R. 17 M. p. 422 at p. 445.
3. (1901) I.L.R. 24 M. 613 at 636.

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The 1st defendant argues that she ought not to have been made accountable for certain jewels said to have been given by her to her daughter and claims contribution from the partible properties for the expenses connected with her daughter's marriage. This claim was not made in the Lower Court and we therefore disallow it.

The 1st defendant also contends that the Lower Court was wrong in making her liable for items 9, 11, 15 and 17 of Schedule D. Plaintiff's witness No. 48 who was the 1st defendant's manager for a considerable time says that these items were collected by the 1st defendant. She denies this but does not produce the bonds which should be in her possession. In these circumstances we agree with the Lower Court that she is liable to the plaintiff for his share of these items.

The finding of the Lower Court will be modified accordingly.

As the release Ex. II has been set aside, the plaintiff must deliver to the 1st defendant items Nos. 1 to 3 in Schedule 1 to that deed as they are pannai lands and are therefore impartible. In the 4th item and the movables in the same Schedule he is entitled to a half share and he must account to the 1st defendant for the other half.

Each party will pay and receive proportionate costs in the appeal.

The Memorandum of Objections is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Phillips.

Secretary of State for India in Council represented by the Collector of Kistna	...	*Appellants* (Defendant in all).*
v.		
Komaragiri Janardhana Rao	...	*Respondent in S. A. No. 1089 (Plaintiff.)*
Chamarthi Venkata Hanumantha Rao	...	*Respondent in S. A. No. 1090 (Plaintiff.)*
Nanduri Bhimaraju	...	*Respondent in S. A. No. 1091 (Plaintiff.)*

Secretary of State for India v. Janardhana Rao.

Civil Procedure Code O. 40 R. 1—Receiver—Powers of—Terms of appointment—Act II of 1894, S. 15—Nomination of karnam by receiver appointed by court—Validity—"Proprietor"—Court.

The powers of a receiver appointed by the court depend upon the terms of his appointment (subject to any modification the court may from time to time make)

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* S. A. Nos. 1089 to 1091 of 1914. 2nd November 1915.

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but where general powers of management are conferred though subject to the control of the court, the receiver is as the person "in lawful management otherwise than as an agent, servant, mortgagee or lessee" the "proprietor" and can validly exercise the power of nominating village officers vested in the "proprietor" under Act II of 1894.

Whatever the amount of control exercised by the court on the receiver, the court cannot be said to be in management so as to be treated as the "proprietor."

Held, accordingly that a direction by the court that in case of nominations of village officers, court's sanction should be previously obtained did not justify the Collector in treating the court as the proprietor and serving notices of nomination on it and requiring appointments to be also made by it.

Second Appeals against the decrees of the court of the Temporary Subordinate Judge of Ellore in A. S. Nos. 226, 241, and 243 of 1912 (transferred for disposal from Sub-court Ellore) preferred against the decrees of the court of the Principal District Munsif of Tanuku in O. S. Nos. 309 to 311 of 1911.

Government Pleader with *P. Somasundaram* for Appellant.

P. Nagabushanam for *L. A. Govindaraghava Aiyar* and *V. Ramesam* for Respondents.

The Court delivered the following

Judgment:—These suits arise out of certain appointments to karnamships made by the Court Receiver of the Nidadavole Estate and reported to the Revenue Divisional Officer under S. 15 of Act II of 1894 (Vide Ex. P. Q. and R. dated 9-3-1910). These appointments have to be made by the "proprietor" of the estate. The term proprietor is defined in S. 4 of the Act, and includes any person who is in lawful management of the estates otherwise than as agent or servant of the proprietor or as mortgagee or lessee.

The first question for determination is whether the Receiver of the Nidadavole estate comes within this definition. Both the Lower Courts have answered this question in the affirmative and in our opinion rightly, subject to certain remarks which we shall come to presently.

The powers of a Receiver appointed by a civil court under O. 40 R. 1 of the Civil Procedure Code (as in the present case) are entirely conditioned by the terms of his appointment, subject to any subsequent modification by the Court under which he holds the appointment. Clause (*d*) of the rule gives the Court complete discretion as to the powers to be conferred on the Receiver: and the Court may limit his powers in any way it thinks fit. But where the powers conferred amount to general powers of management, the effect of S. 4 of Act II of 1894

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would appear to be to attach to the Receiver the special powers conferred on a proprietor by the Act, and subject to any restrictions arising out of the terms of his appointment, there can, we thin , be no question that he should be regarded as a proprietor within the meaning of the Act.

The appointment order in the present case Ex. B, certainly seems to confer general powers of management : and we see no reason why the power of a Proprietor under the Act should not be held to be included in paragraph 4 thereof, which authorises the Receiver to do such other Acts as may be necessary for the efficient administration of the property subject to the control of the Court. We see nothing in Ex. C, the memo. of standing orders for the Receiver's guidance, which should be taken to affect these particular powers. In our opinion the "establishment" in this connection does not include village officers.

There is however an important limitation on the power conferred by para. 4 contained in the words "subject to the control of this Court." The court referred to was the District Court of Godaveri, in the Jurisdiction of which the Nidadavole Zemindari lay, and which appointed the Receiver. But all the powers of control exercised by that court passed to the Sub-Judge of Ellore, to whose territorial jurisdiction the Zemindari was subsequently transferred. As to what this "control" signified, it would in our opinion be unreasonable to hold that it was intended that no act of the Receiver should be valid without prior sanction or even subsequent approval of the Court; but on the other hand, it clearly includes the power of supervision and of limiting and directing the action of the Receiver in any direction. It is in this sense that the order of the Sub-Judge Ex. IX becomes of vital importance in the present case.

Before this order was passed we see no reason to doubt that the Receiver was in the position of a proprietor under Act II of 1894, and competent to act as such. It has now to be considered how far his position was modified by that order.

It was passed by the Sub-Judge on 4-3-1910 (5 days before the appointment of the plaintiff in these suits) on the petitions presented by certain claimants to the Nidadavole Estate, objecting to the action of the Receiver in two directions—(1) in submitting registers (apparently wrongly called nomination rolls) of village-

officers under S. 5 of Act II of 1894, (2) in consenting to the localisation of certain mamul wet lands.

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The Receiver appeared as 1st Respondent and opposed the petitions.

The power of appointment under S. 15 of the Act was not directly in question; but it would presumably stand on the same footing as his power of submitting registers under S. 5; and the Receiver in fact seems to have claimed the full powers of a proprietor under the Act.

The Sub-Judge's order is not altogether easy to understand; and paragraph 9 is incomprehensible. But he seems to have interpreted Exs. B and C as implying that every action of the Receiver (except in the way of granting casual leave) should receive the assent of the court; and he declares that the Receiver's action in the two instances brought to notice was *null and void*, for want of the previous sanction of the court.

The correctness of the interpretation of Exs. B and C is a minor matter. We should certainly not interpret them in that way ourselves and the difficulties in the way of management under such restrictions are obvious—especially if, as seems to be intended, assent means prior assent. But it is for the court to say how it will exercise the power of control reserved to it by the appointment order and it was the duty of the Receiver to obey. It was in this view, that a Bench of this court, of which one of us was a member, rejected a revision petition presented by the Receiver against this order (*vide* Ex. X).

What then was the effect of the order Ex. IX on the Receiver's position as a "proprietor" under the Act? It seems to us that he still remained as he had been before " the person in lawful management of the estate," and therefore classed as a " proprietor". The purport of the order has already been indicated. It does not contain a prohibition in terms of all unauthorised action and even if it be taken that the opinion expressed was meant to be binding on the Receiver, it merely amounts to this. The Receiver was simply saddled with the duty of obtaining the assent of the court to his every action--a very difficult but not absolutely impossible position.

We are now in a position to consider the legality of the Collector's order, Ex. VIII, dated 20-6-1910 which it is sought to set aside as illegal. This order holds in effect that the

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Sub-Judge and not the Receiver is entitled to exercise the powers of a "proprietor" under Act II of 1894: and it directs that in future notices for nominations under the act should be issued to the sub-court only, thus treating the court as a proprietor. There are many objections to such a course as pointed out by the Subordinate Judge and it seems to us that the court cannot be deemed to be the "person in lawful management," for it only exercises control over the estate by the appointment of a Receiver and until such appointment is unable to exercise any powers of management, Order 40 of the Civil Procedure Code. The order also cancels an order of the Head Assistant Collector accepting nominations to the same 3 karnamships by certain claimants to the estate. With this portion we have no concern.

The order in so far as it affects the position of the Receiver is entirely illegal and the decree of the Subordinate Court setting it aside appears to be justified and should be confirmed.

The decisions of both the Lower Courts on the 6th issue appears to be correct.

We dismiss these three appeals and memoranda of objections with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Varadaraja Mudali ... *Appellant* Respondent*
v. *Judgment-debtor.*
Murugesam Pillai and others ... *Respondents.*

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Res judicata—*Point of Procedure—No* res judicata *when procedure altered by statute—Transfer of Property Act, S.99—Application rejected by reason of—Renewal of, after new Civil Procedure Code—Limitation Act, Art.* 182, *cls.* (5) (6)—*Issue of notice on application not in accordance with law—Limitation saved—At the alleged starting point, decree not to be barred.*

Art. 182 of the Limitation Act should receive a fair and liberal and not too technical a construction so as to enable the decree-holder to obtain the fruits of his decree.

The issue of a notice under O. 21, R. 22, Civil Procedure Code is sufficient to save the bar of limitation though it is issued on an application "not in accordance with law" within the meaning of cl. (5) of Art. 182.

A decision on a question of procedure cannot be treated as *res judicata* when the procedure itself is altered by the statute.

On an application by the decree-holder in 1908 for the sale of the attached properties, notice was issued but the application was ultimately dismissed as the property was subject to a mortgage in favour of the decree-holder and the sale of

* A. A. A. O. No. 67 of 1914. 19th August 1915.

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the property in those circumstances was prohibited by S. 99 of the Transfer of Property Act. In 1911, after the passing of the new Civil Procedure Code, the application was renewed by the decree-holder. It was then contended that the application was barred because it was more than 3 years from the last "application in accordance with law", the application of 1908 being not in accordance with law inasmuch as it prayed for a relief which could not in law be granted. It was also contended that the application was barred by the principle of *res judicata*.

Held, that the application was in time being within 3 years of the issue of the notice on the application of 1908 and was not also barred by *res judicata*.

A fresh starting point can be availed of under Art. 182 only if at the date of the alleged starting point, the decree is not barred.

Appeal against the decree of the District Court of Trichinopoly in A. S. No. 632 of 1912, preferred against the decree of the Court of the District Munsif of Namakal in E. P. No. 812 of 1912 in O. S. No. 253 of 1894 on the file of the Court of the District Munsif of Trichinopoly.

T. R. Venkatarama Sastriar for Appellant.

K. S. Ganesa Aiyar for Respondent.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments:—*Sadasiva Aiyar, J.*—The judgment-debtor is the appellant. His learned Vakil Mr. T. R. Venkatarama Sastriar has raised two contentions in his arguments before us, those two contentions being :—

(a) that the application in execution made by the decree-holder dated 4th March 1908 was barred by limitation and,

(b) that the relief prayed for in that application could not be granted to the decree-holder, the matter being *res judicata* against the decree-holder by reason of a prior execution petition dated 13th September 1905 praying for the same relief having been dismissed on the ground that by S. 99 of the Transfer of Property Act the decree-holder could not bring to sale the attached property subject to the decree-holder's own mortgage in execution of the money-decree, though that decree was obtained on a cause of action other than the mortgage document. (Some other contentions suggested before us need not be noticed as they have not been raised in the grounds mentioned in the memorandum of appeal.)

Contention (a) on the question of limitation is based on the argument that the application of 13th September 1905 was not in accordance with law as it prayed for a relief which could not be legally granted by the court and that an application not in accordance with law cannot furnish a fresh starting point of limitation as the expression used in cl. 5 of Art. 182 of the Limitation Act is "the date of applying in accordance with law to the

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proper Court for execution, or to take some step in aid of execution of the decree or order." But the learned District Judge does not rely on cl. 5 of Art. 182 but on cl. 6 of the same article. Mr. Venkatrama Sastriar therefore further argued that clause 6, though it used the wide phrase "the date of issue of notice to the person against whom execution is applied for to show cause why the decree should not be executed against him", must be confined to the date of the issue of such notice *in respect of an execution application made in accordance with law* and ought not to be extended to the date of issue of notice in respect of an application not in accordance with law. (The execution petition of 1905 was dated 13th September 1905 and the date of the issue of such notice seems to have been about a week later). I see no sufficient reason why the words "in accordance with law" found in cl. 5, should be introduced into clause 6 when the legislature has not thought fit to do so. Mr. Venkatrama Sastriar argued that if those words are not introduced the mere issue of a notice in respect of an execution petition which is itself barred by limitation might be contended to give a fresh starting point for limitation. The answer to this objection is that a fresh starting point can be given to a right to sue or to apply only when the right had not become barred on the date of the alleged fresh starting point and that a right to sue to apply once barred by limitation cannot be revived. This was the answer made to a similar argument addressed for the judgment-debtor in the case reported in *Jamna Dut* v. *Bishnath Singh* [1].

Next it was argued that the issue of notice in respect of an execution application not made to the proper court might be contended to give a fresh starting point of limitation if clause 6 was given too wide an interpretation. The answer to this objection is that an application made to a court having no jurisdiction will be treated as waste paper and the notice issued on such an application by such a court is also of no value in the eye of the law.

Article 182 should receive a fair and liberal and not too technical a construction so as to enable the decree-holder to obtain the fruits of his decree. That the language of the article ought not to be strained in the Judgment-debtor's favour has been held in numerous cases which are quoted at page 470 of Rustomjee's Book on Limitation. In *Deo Narain Singh* v. *Bhagwat Naik* [2].

1. (1909) 6 A. L. J. R., 944. 2. (1911) 10 I. C. 411.

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Mookerjee and Caspersz, JJ. held that the issue of a notice under S. 248 of the old Civil Procedure Code was sufficient to save a decree from the bar of limitation under the old Art. 179 corresponding to present Art. 182 even though it was issued upon an application which was not in accordance with law.

In *Kamakshi Pillai* v. *Ramasamy Pillai* [1] Miller and Munro, JJ. held the same view following C. M. S. A. 87 of 1905 and *Pachiappa Achari* v. *Poojali Seenan* [2]. I am prepared to follow these two decisions and the decision in *Jamna Dut* v. *Bishnath Singh* [3] as the dangers alleged to arise by giving too wide an interpretation to clause 6 are not real dangers as I have already tried to point out. The case in *Kamakshi Pillai* v. *Ramasamy Pillai* [1] does not expressly refer to clause 5 of Art. 179 of the old Code corresponding to clause 6 of the present Art. 182 and in some of the other cases quoted before us, the application for issue of notice was itself treated as a step in aid of execution so as to fall under clause 4 of Article 179 of the old Code (corresponding to clause 5 of Article 182 of the New Limitation Act). However, the decisions in *Deo Narain Singh* v. *Sri Bhagawat Naik* [4] and *Jamna Dut* v. *Bishnath Singh* [3] refer to clause 5 of Article 179 and are direct authorities which, as I said, I shall follow. I would therefore over-rule the first contention as to limitation.

As regards *res judicata*, the dismissal of the earlier application of 1905 was based on the then existing law of procedure when properties are sought to be brought to sale after they are attached subject to a mortgage in the decree-holder's own favour. A decision especially on a question of procedure cannot be treated as *res judicata* when that procedure itself is changed by the statute law. Where substantive rights are decided in an order passed in execution proceedings, such decision is, no doubt, *res judicata* in subsequent execution applications. See *Vyapuri Goundan* v. *Chidambara Mudaliar* [5]. The only judicial determination on the application of 1905 was that on the procedure law as it then stood, the decree-holder could not pursue the line of remedy which he then wanted to follow. The new remedy in execution given by the new statute created a new right to apply in execution for the remedy formerly disallowed and the

1. (1907) 18 M. L. J. 14.
2. (1905) I. L. R. 28 Mad. 557.
3. (1909) 6 A. L. J. R. 944.
4. (1911) 10 Ind. Cas., 411.
5. (1912) I. L. R. 37 M. 315 s. c. 24 M. L. J. 23.

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dismissal of a former application on the ground that there was *then* no right to apply for that particular line of remedy cannot be *res judicata* when the new right to apply is relied on. A plaintiff can maintain a suit on a new cause of action which did not exist when he brought a former suit for the same relief though that suit was dismissed on the ground that the plaintiff was not entitled to that relief on the cause of action on which he based it. A decree-holder can, therefore, it seems to me, similarly, maintain an application for a new line of remedy granted by a new statute even though his former application for the same relief had been rejected before his right to the new relief arose. It was said by the Privy Council in *Amanat Bibi* v. *Imdad Hussain* [1]: "But if it be established that the respondent was mortgagor in 1854 with the right of redemption, why should he be barred of his right merely because *at an earlier* date" (1853) "he may have had no right to the property at all?" (The respondent had brought a former suit for possession basing his right on an alleged proprietorship right created in 1853 and had failed in that suit). "The respondent's present claim certainly did not arise out of the cause of action which was the foundation of the former suit." Let us again take a case where the brother of the husband of a childless Hindu widow sued during her lifetime for recovery of property in her hands on the ground that he and her husband were undivided in interest and she took unlawful possession of the property and his suit was dismissed on the ground that he and his brother were divided in interest and the properties sued for belonged to his brother solely. If after the dismissal of such a suit, the widow conveyed the properties to him and he again sued for possession on the strength of that conveyance, his new claim cannot surely be defeated by the plea of *res judicata*. I see no difference in principle whether the second suit or application is based on a new cause of action or on a new right created in the plaintiff or applicant by new statute law. The whole question has been elaborately considered by Sir Bhashyam Iyengar, J. in *Ramaswami Aiyar* v. *Vythinatha Aiyar* [2], and it is difficult to add anything useful to the considerations mentioned in his Judgment as to the principles to be applied by a Court in coming to a decision on the plea of *res judicata*. I would, however just refer to the two cases in *Alimunnissa Chowdhurani* v. *Shama*

1. (1888) L. R. 15 I. A., 106, 111 and 112.
2. (1903) I. L. R. 26 M. 760, s. c. 13 M. L. J. 448.

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Charan Roy [1] and *Baij Nath Goenka* v. *Padmanand Singh* [2], in which it was held that a fresh suit or application will lie even though a former suit or application of similar nature was decided on an erroneous view of the law between the same parties.

I would, in the result, dismiss the appeal with costs.

Napier J.—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

Davuluru Vijaya Ramayya ... *Appellant** *(1st defendant.)*

v.

Davuluru Venkatasubba Rao and others. *Respondents. (Plaintiffs and defendants Nos. 2 and 3).*

Vijaya Ramayya v. Venkatasubba Rao

Civil Procedure Code O. 32 R. 7—Reference to arbitration pending suit without leave of Court—Voidable at the option of minors—Suit to declare decree not binding—Maintainability of—Compromise by father, not guardian ad litem—*Voidable nevertheless—Exercise of option by minors to avoid—Effect on suit—Prior suit for partition—Re-opened with respect to all parties.*

A suit will lie at the instance of a minor party to a suit for a declaration that a decree passed in that suit in accordance with an award on a reference pending the suit cannot bind him as Court's leave was not obtained for the reference under O. 32 R. 7, C. P. C.

In a suit for partition in which the present plaintiffs (minors) their brother and their father were party defendants, they being represented by their brother as guardian *ad litem*, there was a reference to arbitration and a decree was passed in accordance with the award. The plaintiffs, their brother and their father appealed and pending the appeal, a compromise was entered into by the father which was recorded and made into a decree of Court. Leave of the Court was not obtained either for the reference or the compromise.

Held that both the original and the appellate decrees were avoidable at the option of the minor plaintiffs and the effect of such avoidance was to reopen the suit for partition.

Held further that in the circumstances of the case, the suit was reopened not only with respect to the plaintiffs but with reference to all the parties to the suit.

Second Appeal against the decree of the Court of the Subordinate Judge of Masulipatam in Appeal Suit No. 26 of 1913 preferred against the decree of the Court of the Additional District Munsif of Masulipatam in O. S. No. 91 of 1911.

The 1st defendant in the suit was the appellant before their Lordships. The suit was for a declaration that the compromise decree in A. S. 504 of 1907 on the file of the District Court, Kistna, obtained by 1st defendant did not bind the plaintiffs, to set aside that decree and to put the plaintiffs and 2nd defendant

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* S A. No. 1192 of 1913. 16th September, 1915.

1. (1905) I. L. R. 32 C. 749.
2. (1912) I. L. R. 39 C. 848.

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in possession of the plaint mentioned properties or for recovery of plaintiffs' share in the same from the 1st defendant.

The facts admitted by the parties or found by the courts below were as follows.

The 1st defendant, the paternal uncle's son of the plaintiffs and 2nd defendant, brought O. S. 416 of 1905 against the plaintiffs, the 2nd defendant and their father for partition on the ground that the family was undivided. At the request of both parties, that suit was referred to an arbitrator who gave his award. Some months after the award was passed, the 2nd defendant moved the court to set it aside on the ground that he had attained majority even by the time the suit was referred to arbitration. His petition was rejected. Subsequently he presented a petition as guardian of the plaintiffs, who were minors to set aside the award on the ground that the sanction of the court had not been obtained on behalf of the plaintiffs to refer the matters in dispute to arbitration. That petition also was rejected and a decree was passed on the award. Against that decree, the 2nd defendant, on his own behalf and as guardian for plaintiffs, and their father preferred an appeal, A. S. 504 of 1907 referred to above. In that appeal a compromise was effected by which the 1st defendant was given the properties sought to be recovered by the suit of the plaintiffs, and the plaintiffs' branch was allowed to enjoy the rest of the family properties. A decree was accordingly passed in terms of that compromise. No sanction of the court was obtained by means of a petition on behalf of the plaintiffs either when the suit was referred to arbitration by the court of First Instance or when the compromise was entered into in the Appellate Court.

The Lower Appellate Court held, reversing the decree of the Court of First Instance, that the compromise was voidable at the instance of plaintiffs on the ground that the sanction of the court, required by S. 462 of the Code of 1882, was not obtained on their behalf. It, however, held that the compromise was binding on the father of the plaintiffs and on the 2nd defendant, who was then a major. It therefore gave a decree to the plaintiffs for the recovery of their shares of the suit properties.

The points argued in Second Appeal were:—

(1) Sanction of the court should have been presumed in the circumstances of the case,

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(2) The effect of setting aside the compromise decree in appeal was to restore the award decree of the Court of First Instance and the decree appealed against was in any view wrong,

and (3) Even if the compromise decree in appeal and the award decree in the First Court, were held not binding on the plaintiffs, the Lower Appellate Court should have restored the *status quo ante, i. e.,* should have directed the restoration to its file of O. S. No. 416 of 1905 and its disposal on the merits.

The case was heard by their Lordships Mr. Justice Ayling and Mr. Justice Hannay in the first instance.

The Court delivered the following

Judgment:—The first point argued for appellant is that as the compromise was entered into by plaintiff's father and not by their guardian *ad litem* (who was their brother, the present 2nd defendant) no sanction of the Court was necessary under S. 462 of the old Code of Civil Procedure. Reliance is placed on *Ganesha Row* v. *Tuljaram Row* [1] which, however, affords no support for such a contention. It is not denied that if plaintiff's father had been representing the interests of his sons in Appeal Suit No. 504 of 1907 he could not have entered into a valid compromise on their behalf without the leave of the Court so as to bind them: We cannot accept the suggestion that when he had no responsibility for them, and when their interests were entrusted to another person he should have larger powers to bind them. We have no hesitation in rejecting this contention.

It is next argued that although the compromise was entered into without the leave of the Court, it is only voidable by plaintiffs if they can show that it was prejudicial to their interests. Reliance is placed on *Aman Singh* v. *Narain Singh* [2]. We have carefully considered that ruling and do not think it is of any use to the appellant. In that case the Court appears to have considered the propriety of the compromise from the point of view of the minors' interests and to have sanctioned it; though this was after and not before it was entered into. It is not suggested that any thing of the kind was done here; the Court simply recorded the compromise under S. 375 of the old Code of Civil Procedure and passed a decree in accordance therewith. This does not amount to sanction, *vide Kalavati* v. *Chedi Lal* [3]. So far as appears, the propriety of the compromise from the point of view of the

1. (1909) 6 M. L T. 325. 2. (1897) I. L. R. 20 A. 98.
3. (1895) I. L. R. 17 A. 531.

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minors' interests was never considered at all by the Court. We must therefore hold that the compromise is voidable by the plaintiffs in this case.

Lastly it is urged that the decree directing the return by the appellant alone of a portion of the items received by him under the compromise decree is inequitable; and that his claim to plaint item No. 3 embodied in issue 4 must be decided. This appears to be so.

In order to frame a proper decree (apart from the portion declaring the *razinama* and decree in A. S. No. 504 of 1907 to be not valid and binding on plaintiffs) we must call for findings on the evidence on record on issues 4, 7 and 9. Two months are allowed for submitting findings, and 7 days for filing objections.

In compliance with the above order of this Court, the Subordinate Judge submitted the following

FINDINGS:—As directed by the High Court, I beg to record the following findings on issues 4, 7 and 9.

2. Issue 4.—Item No. 3 (1 acre and 14 cents in Survey No. 96) is admitted by the 1st defendant to be the ancestral property of himself and plaintiff's late father, *vide* his deposition. There is no proof that it was plaintiff's father's exclusive property.

3. In 1906, 1st defendant, who was the Kurnam, sued plaintiff's father for recovery of some lands including the one in question, on the ground that they were Service Inams, and could not therefore be held by a non-office-holder, *vide* Ex. A; and it was then decided that the land had lost the nature of "Service Inam" and was held by the plaintiff's father as "Seri" under the Zemindar. Even if it was a Service Inam on the date of its transfer by plaintiff's father to first defendant under the compromise, the transfer was not valid in view of S. 5 of Madras Act III of 1895, and even if the Inâm was enfranchised subsequent to the alienation, 1st defendant is not entitled to the land as against the plaintiffs, *vide Narahari Sahu* v. *Sira Korithan Naidu* [1]. When a Service Inam is enfranchised it becomes family property. I, therefore, find the 4th issue for plaintiffs.

4. *7th Issue.*—It has been held in *Lakshmana Chetti* v. *Chinnathambi Chetti* [2] that an award passed on a reference made to arbitrators in a pending suit would not bind the minors, when leave of the Court was not obtained under S. 462 of the old Code

1. (1913) 19 I. C. p. 881. 2. (1900) I. L. R. 24 M. 326.

of Civil Procedure. The 1st defendant's vakil relies on the decision to the contrary reported in *Hardeo Sahai* v. *Gauri Shankar* [1] affirmed recently in *Lutawan* v. *Lachaya* [2]. I am bound to prefer the Madras ruling and therefore find that the award is not binding on the plaintiffs.

5. *9th Issue.*—Even if the award was not superseded by the decree in appeal, plaintiffs can claim the suit properties, as the award as well as the compromise are not binding on them, *vide Ganesha Row* v. *Tuljaram Row* [3]. I find accordingly on this issue.

[This Second Appeal came on for final hearing after the return of the findings of the Lower Appellate Court upon the issues referred by this Court].

V. Ramdoss for Appellant:—The award itself is binding on the minor and that, even if it is not so binding, when a decree has been passed on the basis of it, that decree cannot be interfered with even at the instance of a minor. The word "agreement" in S. 462 of the Civil Procedure Code of 1882 does not include an agreement to refer to arbitration and sanction of court is not necessary for an agreement to refer through court because it is not an adjustment of the suit under O. 23 R. 3 of the Code.

My submission is that O. 23 R. 3 does not apply and that the words "agreement or compromise" should be given the same meaning in O. 23 R. 3 and O. 32 R. 7 of the Code. *Lakshmana Chetti* v. *Chinnathambi Chetti* [4] is distinguishable because there the reference was not through court; see p. 330.

Hardeo Sahai v. *Gauri Shankar* [1] is authority for the position that a reference to arbitration pending suit which is made a rule of court is not a compromise and does not require sanction under O. 32 R. 7. The observation at p. 37 is authority also for the position that when a decree has been passed on the basis of the award it cannot be set aside even at the instance of a minor. The matter is set at rest really by the decision of the Privy Council in *Gulam Khan* v. *Mahommad Hussain* [5] see pp. 177, 181 and 186. The effect of this decision is that want of sanction under

1. (1906) I. L. R. 28 A. p. 35.
2. (1918) I. L. R. 36 A. p. 69.
3. (1913) I. L. R. 36 M. p. 295.
4. (1900) I. L. R. 24 M. 326.
5. (1902) I. L. R. 29 C. 167.

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S. 462 is not an objection to the validity of an award through court.—See p. 183.

See also *Venkatachala Reddi* v. *Rangiah Reddi* [1].

The word "agreement" must be understood in the same way in O. 23 r. 3 and O. 32 r. 7.

In *Chengal Reddi* v. *Venkata Reddi* [2], an agreement to be bound by the oath of the opposite party was held not to come within S. 462. *Sheo Nath Saran* v. *Sukh Lal Singh* [3], holds that it is not all agreements with reference to the suit that come within S. 462, *Lutawan* v. *Lachya* [4], *Annandakrishna Dey* v. *Jogendra Nath Dey* [5]. Further an order of Court referring to arbitration is in effect a sanction of Court. The order sanctioning compromise need not be express.

Again a decree having been passed on the award, under S. 522 the decree is final and cannot be set aside even if the award is illegal for want of sanction of Court. *Baicha Sahib* v. *Abdul Gunny* [6].

Even if the award is *ab initio* void, the decree is final, *Kanakku Nagalinga Naik* v. *Nagalinga Naik* [7], *Suryanarayana Rao* v. *Sarabhaiah* [8].

Lastly, if the decree in the prior suit is set aside at all, it must be set aside altogether and the parties must be restored to their *status quo ante*. The Lower Appellate Court has set aside the decree as against the plaintiffs and decreed to them their share of the properties allotted to the 1st defendant under the award and the compromise. It must have directed the restoration to its file of O. S. 416 of 1905. See *Khajooroonissa* v. *Rowshan Jehan* [9], *Lakshmana Chetty* v. *Chinnathambi Chetty* [10], *Manohar Lal* v. *Jadunath Singh* [11], *Ganesh Rao* v. *Tuljaram Rao* [12] is authority for the position that the decree must be completely set aside.

P. Nagabhushanam for Respondent:—

The award was superseded by the decree and cannot now be relied upon. The cases relied on the other side do not decide that a suit like the present is not maintainable. They only lay

1. (1911) 21 M. L J. 990 (996.)
2. (1889) I. L R. 12 M. 483.
3. (1899) I. L. R. 27 C. 229.
4. (1913) I. L. R. 36 A. 69 F. B. (71).
5. (1908) 8 C. L. J. 294, (298).
6. (1913) I. L. R. 38 M. 256.
7. (1909) I. L. R. 32 M. 510.
8. (1911) 21 M. L. J. 263. (F. B.)
9. (1876) I. L. R. 2 C. 184 P. C.
10. (1900) I. L. R. 24 M. 326 (331).
11. (1906) I.L.R. 28 A. 585.
12. (1913) I. L. R. 36 M. 295.

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down that an appeal will not lie against a decree based on an award, because the code does not provide for an appeal, *Gulam Khan* v. *Muhammad Hassan* [1]. In *Batcha Sahib* v. *Abdul Gunny* [2] there was no question of a minor. *Barhamdeo Prasad* v. *Banassi Prasad* [3] lays down that there is a right of suit in such a case. *Karmali Rahim Bhoy* v. *Rahim Bhoy Habi Bhoy* [4] shows that a compromise decree not sanctioned by Court will be set aside at the instance of a minor either by suit or by review.

S. 462 of the Code does not exclude a suit at the instance of the minor concerned. Trevelyan on Minors, p. 318. In *Ganesha Row* v. *Tuljaram Row* [5] there was a suit. A reference to arbitration is an agreement within the meaning of S. 462 of the Code and if it is not sanctioned by the Court, it is invalid and can be set aside by a minor. *Lakshmana Chetti* v. *Chinnathambi Chetti* [6]. *Lutawan* v. *Lachya* [7] is distinguishable because that was a case merely of an appeal.

The expression " agreement with reference to suit " in O. 32 R. 7 is wide enough to cover the case of reference to arbitration while the expression in O. 23 R. 3 is only " adjustment ".

The decree of the Lower Appellate Court is right. O. S. 416 of 1905 ought not to be allowed to be restored to its file. The effect of setting aside a decree is not to revive infructuous proceedings taken before it.

The Court delivered the following

Tyabji, J.

Judgments:—*Tyabji, J.*—The present plaintiffs who are minors were parties to Original Suit No. 416 of 1905 which had been instituted by the present 1st defendant for partition. That suit was in the First Court referred to arbitration (by orders in November 1906 and March 1907). The award was dated 9th April 1907 and a decree passed in accordance with it. The present plaintiffs' father appealed from the decree passed on the award (A. S. No. 504 of 1907). The appeal was compromised and a decree was purported to be passed therein by the consent of the parties. The

1. (1902) I. L. R. 29 C. 167 at 182, 183, 185.
2. (1913) I. L. R. 38 M. 256.
3. (1901) 3 C. L. J. 119 (129).
4. (1888) I. L. R. 13 B. 137 (146).
5. (1913) I. L. R. 36 M 295 at 301 P. C
6. (1900) I. L. R. 24 M. 326 (330).
7. (1913) I. L. R. 36 A. 69.

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present suit is to have it declared that the consent decree does not bind the plaintiffs, to have it set aside, to obtain possession of the properties mentioned in the plaint, and other reliefs.

It is admitted that neither the reference to arbitration nor the consent decree was with leave of the court under O. 32, R. 7 (S. 462 of the Civil Procedure Code, 1882). I shall in the rest of my judgment refer only to the Code of 1908 though most of the decided cases are of course on the Code of 1882. At an earlier hearing it was held by this Court that the compromise was on this ground voidable by the plaintiffs, and findings were called for. The finding on the 4th issue is admitted to be one of fact which we cannot question in second appeal. The other findings are contested.

It is contended for the appellant that as the consent decree in appeal is inoperative, the decree passed in the original court must revive, and that, as that decree was passed on an award, it cannot now be set aside, but has become final.

The respondent in answer contends in the first place that the decree on the award was finally and effectively set aside by the appellate consent decree, notwithstanding that the plaintiffs elect to avoid the latter. But the plaintiffs having elected to avoid the consent decree must do so *in toto* so far as they are concerned, and cannot, after avoiding it, rely upon it for the purpose of rescinding the decree which it purported to supersede, and which it would have superseded only if it had been of any legal effect.

The real point on which the parties are at issue is, the appellate consent decree being out of the way, to what extent is the decree on the award binding on the minors? The appellant's argument is based on two cases decided by the Allahabad High Court which are directly in point: *Hardeo Sahai* v. *Gauri Shankar* [1], and *Lutawan* v. *Lachya* [2]. The grounds on which the first of these decisions proceeds are :—

(*a*) that Schedule II to the Civil Procedure Code, 1908, relating to arbitration proceedings, contains special proceedings which are not subject to O. 32 R. 7;

(*b*) that there is nothing in Schedule II requiring the Court to give leave to the parties to make the application for a reference to arbitrations where minors are concerned;

1. (1906) I. L. R 28 A. 35. 2. (1913) I. L. R. 36 A. 69.

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(c) that an application made under Schedule II paragraph 1 is very different from an agreement or compromise contemplated by Order 32, Rule 7; and

(d) that assuming that Order 32, Rule 7 applies, and has been violated, once a decree is passed in accordance with the terms of an award, it can only be impeached on one of the grounds mentioned in Schedule, II, paragraph 16, that is only if, and in so far as, (i) the decree is in excess of or (ii) not in accordance with the award.

In the second case above alluded to, *Lutawan* v. *Lachya* [1]. Richards, C. J., and Ryves, J., approve of the decision in *Hardeo Sahai* v. *Gauri Shankar* [2]; Banerji J. proceeds on a different basis.

I shall deal for the present only with the first three reasons above stated which are cognate to each other.

With all deference I cannot agree that arbitration proceedings can be considered to be special, in the sense that acts of the guardian *ad litem* or next friend of a minor.—I shall include both in the term guardian *ad litem*—in regard to those proceedings, are unaffected by O. 32 R. 7, which defines the powers of guardians. The first step in arbitrations is that the parties should agree to refer; it is also contemplated that they agree upon the arbitrator. (Schedule II, paragraphs 1, 2, 7, 17). See *Ghulam Khan* v. *Muhammad Hassan* [3], and *Luxmi Bai* v. *Hajee Widina Cassum* [4]. Where the parties are before the Court as plaintiffs and defendants in a suit, and any of them is a minor, such agreements on behalf of the minor can be entered into only at the instance of the guardian *ad litem*: O. 32 R. 5. It would be supererogation to expect that whenever any enactment contemplates the doing of any act by the guardian *ad litem* (*e. g.*, entering into an agreement on behalf of the minor) the provisions contained in O. 32 Rr. 6, 7, which define the powers of a guardian *ad litem* should be repeated in that enactment. To say that those provisions are not to be given effect to unless they are repeated in every other Act is to make them a dead letter where they stand. If the provisions contained in the Civil Procedure Code are not to govern arbitration proceedings as laid down in a schedule to the same Act what force can they have in regard to any independent

1. (1913) I. L. R. 36 A. 69.
2. (1906) I. L. R. 28 A. 35.
3. (1902) I. L. R. 29 C, 167 at 173.
4. (1899) I. L. R. 23 B. p. 629.

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enactment? See *Mahadeo Balkrishna* v. *Krishnabai* [1] referred to in *Vithaldas* v. *Dattaram* [2] during arguments.

Here I may refer to an argument of Richards, C. J. and Ryves, J. in *Lutawan* v. *Lachya* [3], *viz.*, that in Schedule II paragraph 1 the expression *agree* is to have no different force from the term *desire*, the latter word being what was contained in S. 506 of the Code of 1882. But where a particular word is altered in a provision which is in other respects re-enacted, it is hardly permissible to interpret the latter provision on the basis that in spite of the alteration, the enactment will have the same force as if the original word had been retained. It seems to me that the legislature substituted for the vague expression *desire* the more definite expression *agree*, which is legislatively defined, and frequently interpreted judicially. But in the present case reading the word "desire" for "agree" cannot support the argument based upon it. For the desire of a minor to refer to arbitration must in the first instance be communicated to the other parties concerned and then to the Court through an application made by his guardian *ad litem*, and as the order granting the application can be made only by the consent of the parties, it must be sanctioned by the Court on behalf of the minor; *Ghulam Khan* v. *Muhammad Hassan* [4], *Luxmibai* v. *Haji Widina Cassum* [5].

The learned Subordinate Judge followed *Lakshmana Chetti* v. *Chinnathambi Chetti* [6] considering it to be directly opposed to the Allahabad decisions above mentioned. It is there decided that as the award therein was not made after a reference by the Court, it could only be taken cognizance of (if at all) as an adjustment of the suit (Order 23, Rule 3). The Court assumed, without deciding, the correctness of the view expressed by Starling, J. in *Samibai* v. *Premji Pragji* [7] that "an agreement to refer coupled with the award resulting from the reference may be treated as an adjustment." *Venkatachala Reddi* v. *Rangiah Reddi* [8]. The grounds for making this assumption have become stronger since *Lakshmana Chetti* v. *Chinnathambi Chetti* [6] was decided as a similar decision is given by Jenkins, C. J. and Starling, J. in *Pragdas* v. *Girdhardas* [9] and it is not rejected in *Tincowry Dey* v. *Fakir Chand Dey* [10] and *Venkatachala Reddi* v. *Rangiah Reddi*. [8]

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1. (1896) Printed Judgments B. H. C. 609.
2. (1901) I. L. R. 26 B. 298.
3. (1913) I. L. R. 36 A. 69.
4. (1902) I. L. R. 29 C. 167 at 173.
5. (1899) I. L. R. 23 B. p. 629.
6. (1900) I. L. R. 24 M. 326.
7. (1895) I. L. R. 20 B. 304.
8. (1911) 21 M. L. J. 990, 996.
9. (1901) I. L. R. 26 B. 76.
10. (1902) I. L. R. 30 C. 218.

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The result of *Lakshmana Chetty* v. *Chinnathambi Chetty* [1] in the light of the later cases may be taken to be that (1) where there is an agreement to refer to arbitration, followed (without the intervention of the Court) by an award, the two together may form "such an agreement, compromise or satisfaction" as has to be recorded by the Court under O. 23, R. 3 and in accordance with which a decree has to be passed: and (2) that in such a case it is necessary if any minors are concerned that leave of the Court should be obtained under O. 32, R. 7 either before the submission to arbitration or after the award, otherwise the award cannot take effect as such agreement, compromise or satisfaction. Hence unless leave has been obtained, the minor is not bound by it: the Court must proceed with the suit so far as he is concerned, and cannot merely pass a decree in accordance with the award.

In the present case we have a reference through the Court, and the gist of this part of the appellant's argument is that such a reference is not an agreement or compromise within O. 32, R. 7. The decision of this question depends in the first instance upon the provisions of the law relating to references through the intervention of the Court, to which I shall presently refer more fully.

It seems to me, however, a legitimate argument on the side of the respondents to rely upon the following words in *Lakshmana Chetty's case* [1]: "The effect of the submission was to take away from the Court the power of adjudicating upon the rights of the minors, and to leave such adjudication to a private tribunal. Such an agreement seems to us to be clearly one falling within S. 462 (O. 32, R. 7) of the Civil Procedure Code." Thus a submission to arbitration without an order of the Court pending a suit, was considered by the Court to be an agreement of the nature referred in O. 32, R. 7. The opinion so expressed is opposed to the view taken in *Hardeo Sahai* v. *Gauri Shankar* [2], unless it can be shown that there is nothing common between such a submission and a submission through the Court. But the preliminary agreement to refer (on which an application to the Court under Schedule II paragraph 1 is subsequently based) must be exactly of the same nature as that which the Court was considering in *Lakshmana Chetti* v. *Chinnathambi Chetti* [1]. This preliminary agreement must always be entered into out of Court. It is only after such an agreement has already been

1. (1900) I. L. R. 24 M. 326. 2. (1906) I. L. R. 28 A. 35.

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arrived at that the parties may follow or make a departure from the provisions of Schedule II; (1) they may apply to the Court for an order of reference, or (2) proceed with the arbitration without such an order. If they choose to apply to the Court, does their agreement to submit to arbitration become (at the hearing of the application) something other than an agreement, merely by reason of their application? It may be argued that after the Court makes an order upon the agreement, its original character merges in the order of the Court. The answer is that by reason of Schedule II paragraphs 2 and 3, the order of the Court is entirely based on the agreement. The Court does not in referring the matter to the arbitrator exercise any judicial discretion, and the passing of such an order on the agreement is hardly more than a ministerial act. The analogy between an order passed on an agreement to refer to arbitration, and a decree passed on compromise falling under O. 23, R. 3 is complete. Where a compromise on behalf of a minor has not been sanctioned by the Court under O. 32, R. 7, it acquires no validity by reason of a decree having been passed on it :—*Ganesha Row* v. *Tuljaram Row* [1]. Equally it seems to me that where an order is passed on an agreement to refer, the order has no more validity in regard to the sanction of the Court, than the agreement itself.

As against these considerations the decision in *Ghulam Khan* v. *Muhammad Hassan* [2] was relied upon by the appellant. Lord Macnaughten there said : " In cases falling under Head I the agreement to refer and the application to the Court founded upon it must have the concurrence of all parties concerned and the actual reference is the order of the Court. So that no question can arise as to the regularity of the proceedings up to that point." In the sentences immediately following he describes an application under paragraph 17 or 20 as a "litigious proceeding," in the sense that " Cause may be shown against the application." Reading the whole of the paragraph together it seems to me that nothing more is meant than that when the parties have agreed to a proceeding they cannot object to it. The words "no question can arise as to the regularity of the proceedings up to that point" cannot imply that the validity of " the agreement to refer " (which, as Lord Macnaughten expressly says, "must be the agreement of

1. (1913) I. L. R. 36 M. 295, 303. 2. (1902) I. L. R. 29 C. 167, 183, 184.

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all the parties to the suit" (p. 182) and "must have the concurrence of all parties concerned" (p. 183)) can never be questioned, or that if questioned before a Court competent to decide upon it, then the provisions of the Civil Procedure Code are not to be considered for determining whether the guardian was entitled to bind the minor—this question being involved in the question whether the agreement to refer had the concurrence of all the parties concerned.

His Lordship however also stated that "there did not appear to have been any substance in any of" the objections raised against the award—the first of these being that the defendant's guardian had agreed without leave of the Court to refer the case to arbitration. It was argued that this expression of opinion must be taken to mean that leave is unnecessary.

But this does not seem to be so. The allegation that at the time of the reference leave of the Court had not been obtained, was apparently brought to the notice of the Subordinate Judge (see *Ghulam Khan* v. *Muhammad Hassan* [1]), and he nevertheless pronounced judgment in accordance with the award. As implied in *Lakshmana Chetti* v. *Chinnathambi Chetti* [2], the leave may be obtained either at the time of agreeing to refer or after the award. Their Lordships of the Privy Council in *Ghulam Khan* v. *Muhammad Hassan* [1], point out that the award was a fair and reasonable settlement. Therefore the objection was characterised as one in which there was no substance. It is also noticeable that their Lordships refer (p. 184) to the objection that the award was bad because the Court had no jurisdiction and dispose of this objection by saying that the Court will not sit as a Court of Appeal on awards in respect of matters of fact, or of law and cite *Adams* v. *Great North of Scotland Railway Co.*, [3]. But there is no reference to the point whether the minors were bound by the award; see also *Jones* v. *Powell* [4], *Weightson* v. *Bywater* [5].

In my opinion therefore the agreement contemplated in Schedule II, paragraph I *et seq.* is an "agreement with reference to the suit" under O. 32, R. 7 and it is not validly entered into on behalf of a minor where the guardian of the

1. (1902) I. L. R. 29 C. p. 167, 171, 185.
2. (1900) I L R. 24 M. 326.
3. (1891) A. C. 31.
4. (1838) 6 Dowl. Pr. Cas. 483, 485 (49 R. R. 728, 729)
5. (1838) 3 M. and W. 199, 204, 205.

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minor purports to bind the minor without the leave of the Court expressly recorded and thus exceeds the authority given to him by the said rule.

The last ground (*d*) mentioned above must now be considered. It was contended that the decision of the Judicial Committee reported in *Ghulam Khan* v. *Muhammad Hassan* [1] is a direct authority in its favour.

Before dealing with this aspect of the case it is necessary to refer to the relevant provisions of the Code with particular reference to the question whether any means are available to a minor for rectifying an order of reference made without leave of Court under O. 32, R. 7.

The first stage in arbitration proceedings under Schedule II is, as I have already said, to agree to refer. Next comes the application to the Court under paragraph 8: The leave of the Court under O. 32, R. 7, may then be obtained. Where this is omitted to be done, the arbitration proceeds independently of the Court, unless the Court is asked to make an incidental order subserving the course of the arbitration proceedings, which it is empowered to make in regard to the following matters :—

(1) fixing or enlarging the time for making the award : paragraphs 3 (1), 4 (2), and 8.

(2) providing for the course to be followed in cases of disagreement between two or more arbitrators (when the parties are not able to agree) : paragraph 4 (1) (d).

(3) appointing an arbitrator or umpire : paragraph 5 (2).

(4) giving leave to the arbitrator to state a case: paragraph 11.

Apart from these incidental orders, the powers of the Court, that has made an order of reference, as well as of the Appellate Court over the litigation or the arbitration are restricted (paragraph 3 (2)) to making one of the following 6 classes of orders :—

(i) The Court making the reference may make an order superseding the arbitration, but only where there has been failure (a) to appoint an arbitrator or umpire or (b) to make the award in time; paragraphs 5, 8.

(ii) It may modify or correct the award if (a) it deals with a matter not referred to, or contains some, (b) formal or (c) obvious or (d) clerical mistake etc : paragraph 12;

1. (1902) I. L. R. 29 C. p. 167, 171, 185.

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(iii) It may remit the award to the reconsideration of the arbitrator if (a) some matter that ought to be determined by him has been left undetermined, or (b) *vice versa*, or (c) if it is indefinite, or (d) there is an objection to its legality apparent on the face of it; paragraph 14.

(iv) It may supersede the arbitration and proceed with the suit after setting aside the award in the circumstances mentioned or implied in paragraph 15, *viz*., (*a*) for corruption or misconduct of the arbitrator; (b) for fraudulent concealment etc.; (c) the award having been made—

(1) after an order of supersession by the Court (under paragraph 5 or 8).

(2) after the expiration of the period allowed by the Court;

(3) being otherwise illegal;

(d) the award having been remitted and the arbitrator or umpire having failed to re-consider it (paragraph 15, first sentence);

(v) it may pronounce judgment in accordance with the award: (paragraph 16).

(vi) From a judgment pronounced by the Court making the reference under the last mentioned provision there is no appeal except in so far as the decree is (a) in excess of, or (*b*) not in accordance with the award.

It will be observed that the first class of orders may be made before, and the rest after the award has been made: the 5th is merely to give effect to the award: the first 5 are powers to be exercised by the Court making the reference: the 6th class alone refers to the powers of the Appellate Court, which (so far as the provisions now under consideration are concerned) are defined only in regard to cases where the Court making the reference has passed an order under the fifth head: there are no provisions regarding the Appellate Court's power where the Court making the reference has exercised any of its powers under the first 4 heads.

These powers do not, it is apprehended, affect the Court's powers of reviewing its own judgment. But the power of review need not now be considered. I now come to deal with the decision in *Ghulam Khan* v. *Muhammad Hassan* [1].

The argument before the Privy Council was that the award was not a valid and legal award—(1) having been made without jurisdiction—jurisdiction having been taken away from the Civil

1. (1902) I. L. R. 29 C. 167.

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Courts by the Punjab Tenancy Act, and (2) the agreement to refer to arbitration having been without leave of the Court under O. 32, R. 7.

The question directly decided was whether there was any ground, (1) on which an appeal lay, or (2) on which the Chief Court of the Punjab could have exercised its powers of revision. Each head of this question was answered in the negative for the reasons.

(1) that no appeal lies except in so far as the decree is in excess of or not in accordance with the award, (6th head above) and this was not alleged,

(2) that revision was not permissible, as (*a*) it would lay the finality of an award open to question, (*b*) being avowedly an application to set aside the award it was barred by limitation, and (*c*) even if it were not barred, the Subordinate Judge had in the events that had happened, no option but to pass a decree in accordance with the award, and had strictly followed the course prescribed by the Code.

Their Lordships' decision therefore referred directly only to the powers of the Appellate Court in cases where the Court making the reference has proceeded under the fifth head and consequently where the Appellate Court's powers are subject to the 6th head above.

Previous to this decision it had been held by the Privy Council (approving the trend of decisions in India) that the finality of a decree on an award depends upon the award itself being valid and legal and that therefore an award may be shown in appeal to be illegal in which case the decree on the alleged award would be set aside and suits ordered to be proceeded with; *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* [1]. See also *Maharajah Joymungul Singh Bahadoor* v. *Mohanram Marwaree* [2] (referred to in *Nandram Dahuram* v. *Nanchand Jivchand* [3].

I need not consider such cases as *Atchutayya* v. *Thimmayya* [4] which had held that on appeal from the final decree passed after an award has been set aside, the propriety or otherwise of setting aside the award may be considered by the Appellate Court. Those cases have reference to the powers of the Appellate

1. (1891) I. L. R. 13 A. 300. A. C. 2. (1875) 23 W. R. 429. C. R.
3. (1892) I. L. R 17 B.357,360.
4. (1907) I. L. R. 31 M. 315 18 M. L. J. 228.

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Court when they are not restricted by the 6th head above. In *Raja Har Narain's case* [1] their Lordships of the Privy Council approved of this view, and proceeded further. For, reversing the decrees of both Courts in India, they set aside a decree based on an award which was shown to have been made after the expiry of the time fixed for the making of the award, thus in effect enlarging the powers of the Appellate Court under the 6th head, by adding to it the power to set aside a decree passed in accordance with the award when it is found that the award itself was illegal on one of the grounds mentioned in paragraph 15. On this point there seems to be a conflict between *Raja Har Narain's Case* [1] and *Ghulam Khan* v. *Muhammad Hassan* [2]. In the judgment in *Ghulam Khan's case* [2], however the point (though argued in appeal) was not alluded to. The decision in *Raja Har Narain's Case* [1], was apparently not cited to the Privy Council in *Ghulam Khan* v. *Muhammad Hussan* [2], nor is it alluded to in the judgments of the Punjab Chief Court.

The conflict between *Raja Har Narain's case* [1], and *Ghulam Khan* v. *Mahammad Hussan* [2], is explained in *Rajaram Dassi* v. *Ganesh Prasad Mohapatra* [3], by the fact that in the earlier case the question of the competence of a Court of appeal was not raised, but it is noticeable that Lord Morris said in the beginning of his judgment that the case had to be decided upon the construction of Ss. 508, 514 and 522 of the Civil Procedure Code; and in the absence of express reference to *Raja Har Narain's case* [1], in *Ghulam Khan* v. *Muhammad Hussan* [2], we cannot proceed on the basis that that case has been overruled: and we must as far as possible give effect to both pronouncements of the Judicial Committee.

The two decisions can be partially reconciled if *Ghulam Khan* v. *Muhammad Hassan* [4] is taken as deciding that the matters on which the decision of the Court making the reference is final (provided it upholds the award) must be connected with the proceedings before the arbitrator (see paragraphs 14 and 15). That something to this effect was in the minds of their Lordships is indicated by the following expressions: "The Court makes an order of agreement (which must be the agreement of all the parties to the suit"), "In cases falling under head 1 the agreement to

1. (1891) I. L. R. 13 A. 300 P. C. 2. (1901) I. L. R. 29 C. 167.
3. (1910) 14 C. W. N. 626. 4. (1901) I. L. R. 29 C. 167.

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refer and the application to the Court founded upon it must have the concurrence of all parties concerned and the actual reference is the order of the Court. So that no question can arise as to the regularity of the proceedings up to that point." Thus they assume that the regularity of the proceedings up to that point is not in question. Their Lordships also cite *Adams* v. *Great North of Scotland Railway Co.* 1, the first portion of the headnote to which seems to me to represent correctly the views expressed by *Lords Halsbury and Watson* in the following terms "The Act of Regulations of 1695, which provides that "for the cutting off of groundless processes in time coming the Lords of session sustain no reduction of any decrees arbitral pronounced on a prescribed submission upon any cause or reason whatsoever unless that of corruption, bribery, or falsehood to be alleged against the Judges' arbitrators" was intended to put an end to the practice which had previously obtained of reviewing awards upon the merits; but not to prevent the Courts from setting aside an award where the arbitrator has exceeded his jurisdiction or has disregarded any one of the expressed conditions or the submission, or the conditions implied by law, or has been guilty of misconduct in the course of the reference or in the making of the award."

This view of the case in *Ghulam Khan* v. *Muhammad Hussan* 2, seems also to have been taken in *Walji Mathuradas* v. *Eliji Umersey* 3, by Jenkins, C. J. and Batchelor, J., who referring to *Nandram Daluram* v. *Nemchand Jadavchand* 4, say "But the Bombay case only decides that an appeal lies where the award is illegal *ab initio*, or, in other words, where in law there is no award. Obviously if there is no award, there is no basis for the decree." The case in *Ghulam Khan* v. *Muhammad Hassan* 2, is cited by them at the end of the judgment. *Surya Narayana Rao* v. *Sarabhaiah* 5, may seem at first sight to be against the view I am taking, but the question referred to the Full Bench shows that the objection to the award was that on the refusal of two arbitrators to act and on their subsequent death the Court had appointed new arbitrators in their stead and three of the old and the two new arbitrators had made the award. This was clearly an objection to the proceedings in

1. (1891) A. C. 31.
2. (1891) I. L. R. 13 A. 300 A. C.
3. (1000) I. L. R, 29 B. 289.
4. (1892) I. L. R. 17 B. 357.
5. (1910) 21 M. L. J. 263.

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arbitration, on all of which the Court making the reference has to decide finally under the new Code. The Chief Justice (with whom Ayling J. agrees) at page 276 distinguishes *Raja Har Narain's Case* [1], from *Ghulam Khan* v. *Muhammad Hussan* [2]. Krishnaswami Aiyar, J. does the same and points out (page 278-279) one kind of invalid awards which would not be covered by paragraph 16.

In the case before us the award is not said to be invalid for any corruption or misconduct on the part of, the arbitrator or of the parties to it during the arbitration. The Court is not asked as a "Court of Appeal to examine whether or not the conclusion at which the arbitrator had arrived was sound in point of law or in point of fact." *Adams* v. *Great North of Scotland Railway Co.* [3] per Lord Halsbury. What we are asked to, pronounce upon is quite distinct,—whether the proceedings not of the arbitrator, but of the Court bind the minors or are voidable by them.

It seems to me therefore though not without hesitation that the principle of finality which finds expression in the Code *Gulam Khan* v. *Muhammad Hassan* [2] does not affect matters which are outside the arbitration proceedings. The objection in the present case is therefore not barred.

It has not been contended before us that the minors could in the present case have avoided the arbitration proceedings except by instituting a suit to have it declared that the decree which purports to bind them is a nullity.

For these reasons in my opinion it was competent to the minors to institute the present suit and to obtain a declaration that the decree on the award does not bind them.

Ayling, J. :—I agree.

This Second Appeal came on for further hearing on Monday the 6th September 1915, when the Court delivered the following

Judgment:—On a previous occasion, we delivered our judgment holding that the minor was entitled to avoid the decree against him. We let the appeal stand over in order that the learned vakils may address us on the exact form in which our order should be framed.

It has been argued before us to-day that the decree which the minor seeks to avoid is of such a nature that it cannot be avoided only as against him and not as against the other parties to it. It

1. (1891) I. L. R. 13 A. 300. 2. (1902) I L. R. 29 C. 167, at 183.
3. (1891) A. C 31.

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Tyabji, J.

is a partition decree under which the property is divided into two moieties. We have referred to the terms of the decree and to the facts of the case and we are satisfied that the contention is correct. In our opinion it would be quite impracticable and highly inequitable to allow the minor to avoid the decree only in part. His avoidance of it must be entire as his rights and liabilities under the decree are not separable from the rights and liabilities of the other party to the partition.

It was then argued by Mr. Nagabushanam that we cannot in the present appeal order that the original suit which has been compromised in the decree that has now been declared to be voidable, should proceed. We accede to the contention. We are not seised of that suit and we cannot pass any orders with reference to it. Formally our order will merely be that the minor is entitled to avoid the decree and we shall (should the minor exercise that option) record the fact that he has exercised the option but we cannot further give any directions in regard to the previous suit.

It is, however, a part of Mr. Nagabhushanam's argument not only that we cannot in our decree give any such directions as aforesaid to the Court seised of the other suit, but that our order will not have the effect of reviving that other suit. This is a point concerned with the effect and interpretation of our order and we have heard arguments on the point and consider it imperative on us to give a decision on it. We are of opinion that the effect of our order is that the minor has the option of avoiding the decree *in toto*, but that he has no option (even if it were possible to be done in the circumstances of this case) to avoid the decree in part only. Should then the minor avoid the decree the appellant will be able in our view to go to the Court of the District Munsif of Gudivada where the original suit was instituted and ask the Court to proceed on the basis that there is no decree in the suit, inasmuch as the minor has been declared to be entitled to avoid the decree and has exercised that option. On this we expect that the Court will proceed with the trial of the suit, as after the avoidance of the decree the suit will be without any proper or final adjudication.

Mr. Nagabhusanam relied upon *Bhimaji Govind* v. *Rukmabai* [1] in which the Court refused to have the suit restored to the file. We do not intend to lay down that the Court may not on

1. (1885) I. L. R. 10 B. 338, 340.

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occasions do that. The avoidance by the minor of a decree against him may in some cases *ipso facto* be tantamount to an adjudication of the suit; in others it may be possible and proper for the Court merely to avoid such a part of the decree as would affect the minor and that part may be separable from the rest. This seems to have been the case in *Pasupathi Nath Bose* v. *Nando Lal Bose* [1] where however in any case the matter arose in execution, and the Court considered that the decree had not as a matter of fact been set aside as against or between the parties other than the minor. The same seems to have been the case in *Manohar Lal* v. *Jadunath Singh*, [2] where the Privy Council evidently considered that it would be proper to let the decree stand as against others than the minors. In these cases however it was not, and could not be, considered what was to be the result of the suit so far as the decree had been set aside *i. e.* as between the minor and the other parties to the decree. As to that part of the decree the cases show that the parties are relegated to their original rights.

The decision in *Earl of Bandon* v. *Bicher* [3] cited in *Bhimaji Govind* v. *Rukmabai* [4] is not opposed to the view we have expressed. In form we cannot order that a suit from which there is no appeal before us should be proceeded with, notwithstanding that it might have been instituted in a Court subordinate to us, any more than the Court of Chancery could review a decree of the Court of Exchequer. But that is not what we are doing. We are merely declaring the terms on which in the present case the minor can avoid the consent decree. In our opinion it is impossible to let him avoid it only in part.

Mewa Lal Thakur v. *Bhiijhunjha* [5] proceeds on the basis that the only proper course where a decision is alleged to be fraudulently obtained is to apply by review. That course is not in the light of more recent decisions now alleged to be the only available course. Apart from this *Mewa Lall Thakur* v. *Bhuihun-Jha* [5] supports the view that the real effect of avoiding a decree is to require that the the suit should proceed till a valid decree is passed therein.

The view we have taken seems to us to be supported by *Khaioornissa* v. *Rowghan Jehan* [6].

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1. (1902) I.L.R. 30 C. 718.
2. (1906) I. L. R. 28 A. 585.
3. 3 Cl. & Fin. 479, 510.
4. (1885) I. L. R. 10 B. 338.
5. (1874) 13 Beng. L.R. App. p. 11.
6. (1876) I.L.R. 2 C. 184, see at pp. 191 196

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We declare therefore that the minor is entitled if he elects to avoid the decree in Suit No. 416 of 1905 on the file of the District Munsif of Gudivada and we give him 10 days to let us know whether the option has been exercised.

[This case again came on for further hearing on Thursday, the 16th day of September 1915 when the Court delivered the following]

Judgment:—It is now stated to us that the minors elect to avoid the decree in Original Suit No. 416 of 1905 and we declare that the decree is of no effect. The trial of that suit will no doubt proceed if a proper application is made to the proper Court, though we cannot make any order as to that in the present appeal.

We set aside the decree of the Lower Court so far as the 1st defendant is ordered to put the plaintiffs into possession.

We have heard the vakils on the question of costs. In our opinion the suit has resulted from errors in proceedure for which we cannot held one side to be more at fault than the other. The most proper course seems to us to order each side to bear his or her own costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

Suppu Nayakan ... *Appellant * (Petitioner-Plaintiff).*

v.

Perumal Chetty ... *Respondent (Respondent Defendants' Legal Representative).*

Suppu Nayakan v. Perumal Chetty.

Civil Procedure Code, S. 2—"Decree"—Order declaring suit abated for defendant's representatives not being brought on record in time—O. XXII, R. 4—Appealable—Practice—Final decree dismissing suit to be drawn up.

An order declaring that the suit has abated by reason of more than 6 months having elapsed from the date of the defendant's death without his legal representatives having been brought on record is a decree and is appealable.

On a suit or appeal abating a decree dismissing, the suit or appeal must, properly speaking follow.

Appeal under clause 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Ayling in C. R. P. No. 513 of 1913 for revision of the decree of the Court of the District Munsif of Melur in O. S. No. 634 of 1912 (O. S. No. 178 of 1911 on the file of the Court of the District Munsif of Dindigal.

K. S. Jayarama Aiyar for Appellants.

T. V. Muthukrishna Aiyar for Respondents.

* L. P. A. No. 318 of 1914. 25th February, 1916.

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Sadasiva Aiyar, J.

The Court delivered the following

Judgments:—*Sadasiva Aiyar, J.*—The appellant was the plaintiff in O. S. No. 178 of 1911 on the file of the District Munsif's Court of Dindigal. The only defendant in the suit died in March 1912. On the 15th April 1912, the plaintiff applied to bring in the defendant's son Perumal Chetty on the record as the defendant's legal representative. He failed to mention the order and rule of the Civil Procedure Code, under which the application was filed. On the 23rd April 1912 the Court returned the application to him for amendment giving him three days' time to take it back, amend and re-present it. The District Court transferred the suit about the end of April 1912 to the District Munsif's Court of Melur for disposal. The records were sent away from the District Munsif's Court of Dindigal accordingly to the District Munsif's Court of Melur but retaining the above application (which was not taken back by the plaintiff for amendment and re-presented). The other records were sent away from the District Munsif's Court of Dindigal on 25th May 1912 and the suit was numbered O. S. No. 634 of 1912 on the file of the District Munsif's Court of Melur. The plaintiff's application which he had been ordered to take back seems to have been sent to the District Munsif's Court of Melur separately in October 1912. Then on the 13th November 1912 the plaintiff put in a petition in the Melur District Munsif's Court to excuse the delay in taking back, amending and re-presenting the application. The petition was ordered without notice having been sent to the respondent (the deceased .....defendant's son) and he was brought on the record and was designated as the 2nd defendant in the case. When summons was served on him, he contended that the suit had abated in September 1912 on the expiry of six months from his father's death, that the plaintiff had no right after the suit had abated to put in any application in the suit other than an application to set aside the abatement as the suit must be taken to have come to an end on the abatement and that the order of the Court extending time for representing the application to bring in the legal representative and directing the legal representative to be brought on record was passed without jurisdiction. Thereupon an additional issue was framed in the suit, namely, " Whether the suit should abate for the reasons given in the written statement of the 2nd defendant" ?

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The District Munsif decided this issue in the 2nd defendant's favour and dismissed the suit with costs on 17th March 1913.

The plaintiff then filed C. R. P. No. 513 of 1913 under S. 115, C. Procedure Code in this Court. Mr. Justice Ayling dismissed the revision-petition on the ground that the decree of the District Munsif was appealable and hence no petition lay under S. 115 of Act V of 1908 to the High Court.

This Letters Patent Appeal is against the above order of the learned Judge, the grounds of appeal being:—

"2. The learned Judge erred in holding that the order sought to be revised was a decree and hence appealable."

"3. The learned Judge failed to note that the order in question did not conclusively determine any of the rights of the parties in controversy in this suit and as such was not a decree within the meaning of the Civil Procedure Code of 1908."

"4. The learned Judge should have interfered at least on the ground that there is no defence to the contentions of the petitioner and that any appeal to the District Court would only multiply proceedings."

The fourth ground cannot be accepted as where there is an appeal to the District Court and a second appeal to the High Court, S. 115 cannot apply. See *Visvanathan Chetty* v. *Ramanathan Chetty* [1] and *Subbiah Pillai* v. *Kailasam Pillai* [2].

As regards the other two grounds there are no doubt observations in certain decisions of the Calcutta and Allahabad High Courts (see *Hamida Bibi* v. *Ali Hussen Khan* [3], and *Walayat Hussain* v. *Ramlal* [4],) which support the appellant's contention, but on the other hand this court has hold in *Subbayya* v. *Saminadayyar* [5], (and in *Meenatchi Achi* v. *Anantanarayana Aiyar* [6],) following *Bhikkaji Ramachandra* v. *Purshotam* [7] that an order declaring a suit to have abated is a decree from which an appeal lies. The appellant's learned vakil Mr. K. S. Jayarama Aiyar has called our attention to the fact that whereas under S. 366 of the old Code, when a plaintiff died the Court had to pass an order that the suit shall abate if no application is made within the time limited by law, etc., under O. 22 R. 3 of the New Code the suit abated without a formal order of the Court that the suit shall

1. (1910) I. L. R. 24 M. 646.
2. (1914) 1 L. W. 905.
3. (1895) I. L. R. 17 A. 172.
4. (1914) 12 A. L. J. 1113.
5. (1895) I. L. R. 18 M. 496 s. c, 5 M. L. J. 63.
6. (1902) I. L. R. 26 M. 224.
7. (1885) I. L. R. 10 B. 220.

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abate. But I do not think that this makes any difference in principle. Under the old Code, S. 368, when a defendant died and the right to sue survived but the plaintiff failed to make a proper application within the period prescribed, the suit abated without any formal order. It was only to make the wording of the provision prescribed for the two sets of circumstances to conform with one another as far as possible that O. 22 R. 3 has used the words "the suit shall abate" instead of the expression in the old S. 366 "the Court may pass an order that the suit shall abate." The practice in the Madras Courts so far as I know is that when the suit has abated, the Court also *ipso facto* dismisses the suit, that if it takes it off from the file of the pending suits. Though O. 22 Rs. 3 and 4 do not expressly state that the abatement of a suit is of the same effect as the dismissal of the suit, I think that that is the meaning of the legislature and in *Subbayya* v. *Saminada Ayyar* [1] there was a decree dismissing the suit drawn up on the abatement of the suit and against that decree the learned Judges hold that an appeal lay. Again the analogous O. 22 R. 8 (old S. 370) states in clause (1) that the insolvency of a plaintiff *shall not cause the suit to abate* if the assignee or receiver wishes to continue the suit. And then in Clause (2) it is said that if the assignee or receiver neglects or refuses to continue the suit and the defendant applies for the dismissal of the suit, the Court may make an order dismissing the suit. Thus, the abatement of the suit and the passing of an order which has the force of a decree dismissing the suit are treated as closely connected if not identical proceedings. I might, however, suggest that the Rule committee might make it clear by the enactment of a rule that, in cases where suits have abated without the necessity of a formal order, a decree dismissing the suit should be drawn up as on the date of the abatement unless, of course the abatement is set aside by appropriate proceedings. In *Subramania Iyer* v. *Venkataramaier* [2], myself and Napier, J. held that an order of the Court declaring that the suit has abated owing to the cause of action not surviving was a decree as it determined that the rights of the plaintiff ceased to exist on his death and therefore it fell within the definition of a decree "there being no appeal provided for in the Code from that order as an appeal from an order. See exception (a) to S. 2 clause (2), Civil Procedure Code." Mr. Jayarama Iyer, however, argued

1. (1185) I. L. R. 18 M. 496. s. c. 5 M. L. J. 63. 2. (1914) 31 I. C. 4.

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that the definition of a decree in S. 2 Cl. 2 applied only where the order disposing of the suit contained an express adjudication on the defences raised by the defendant or the rights set up by the plaintiff, (defences not only on the merits but on technical questions like limitation or *res judicata*) but that where the adjudication of the suit had proceeded on mere questions of procedure (such as where the suit is dismissed for default etc.) the order is not a decree within the definition. He relied upon several cases decided by the other High Courts for the establishment of this proposition. But as I said before this High Court has held that where the suit is finally determined by the order it is a decree unless it is excepted specially or unless an appeal is provided for by the Code itself from such an order *as an appeal from an order*. In fact, the New Code when it says that the definition of a decree "shall not include any order of dismissal for default" clearly implies that but for the exception so expressly enacted an order of dismissal for default would be a decree as it determines the rights of the parties with regard to the matters in controversy in the suit. The controversy as to preliminary and final decrees in the Bombay High Court which was set at rest finally by *Chanmalswami* v. *Gangadharappa* [1] which was relied on by Mr. Jayarama Aiyar has not much relevancy on this question of the definition of a decree. I therefore hold that Ayling, J., was right in dismissing the revision petition before him. We were asked to interfere finally under S. 15 of the Charter Act, but the power under that section can only be exercised in extraordinary cases and subject to the enactments of the Indian Legislature. I therefore dismiss the Letters Patent Appeal with costs.

Moore, J.

Moore, J:—I agree. The question raised by this appeal is whether the District Munsif's order dismissing the suit on the ground that it had abated under O. 22 R. 4 (3) of the Code of Civil Procedure by reason of the application which had been made under sub Rule (1) of O. 22 R. 4 of the Code to make the legal representative of the deceased defendant a party, not having been represented within the time fixed by law, is a decree and appealable as such.

In *Subbayya* v. *Swaminadayyar* [2] following *Bhikkaji Ramachandra* v. *Purshotham* [3] it was held that an appeal lay

1. (1914) I. L. R. 39 B. 339. 2. (1895) I. L. R. 18 M. 496 s. c. 5 M.L. J. 63.
3. (1885) I. L. R. 10 B 220.

against an order rejecting an application under S. 366 of the Code of 1882 to bring on record a person claiming to be the legal representative of a deceased plaintiff and dismissing the suit on the ground that it had abated, and also against the dismissal of the suit. In *Bhikkaji Ramachandra* v. *Purshotham* [1] Sargent, C. J. and Birdwood, J., held that an order under S. 366 of the Code of Civil Procedure that a suit do abate virtually a decree within the meaning of S. 2 of Act XIV of 1882 as it disposed of the plaintiff's claim as effectually as if the suit had been dismissed and appealable. In a recent case, *Subramania Iyer* v. *Venkataramaier* [2] my learned brother and Napier, J., ruled that an order declaring that a suit had abated owing to the cause of action not surviving was a decree as it determined that the right of the plaintiff ceased to exist on his death and therefore came within the definition of decree in S. 2 (2) of the Code of Civil Procedure.

I respectfully follow these decisions. It is true the words "the suit shall abate" in Schedule (2) of O. XXII, R. 3 of the Code of Civil Procedure, have been substituted for the words "the court may make an order that the suit shall abate" which occurred in S. 366 of Act XIV of 1882.

The latter words gave rise to a conflict of opinion as to whether an order that a suit shall abate was appealable, the Madras and Bombay High Courts holding that such an order was a decree, and therefore appealable, while the Allahabad High Court took a different view. It is probable, I think, that the alteration in the wording was made in order to give effect to the Madras and Bombay Rulings and bring the language of the two rulings into conformity. Under the present rule it is not necessary to make an order that the suit shall abate. The suit abates *ipso facto* if no application is made under schedule (1) of R. 4 of O. XXII of the Code of Civil Procedure within the time fixed by law, and must be dismissed.

As pointed out by my learned brother although Rr. 3 and 4 of O. XXII of the Code of Civil Procedure do not expressly state that the abatement of a suit has the same effect as the dismissal of a suit, this appears to have been the intention of the

1. (1885) I. L. R. 10 B 220. 2. (1915) 31 I. C. 4.

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Legislature upon a suit abating under rule 3 or rule 4 of O. XXII of the Code of Civil Procedure, a decree dismissing the suit must follow.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

Govindasawmi Pillai .. *Appellant* * (*Petitioner-Defendant*).

v.

Ramasawmi Aiyar and another. *Respondents* (*Respondents-Plaintiffs*).

Govindasawmi Pillai v. Ramaswami Aiyar.

Transfer of Property Act, S. 6—Claim to damages for use and occupation—Not assignable—Provincial Small Cause Courts Act S. 25—Interference discretionary—No interference when no merits.

A claim to damages for use and occupation from a tenant continuing on the land after the expiration of his lease, without the landlord's consent is a mere right to sue for damages and is not transferable.

Interference under S. 25 Provincial Small Cause Courts' Act is discretionary and the High Court is not bound to interfere when there is no case on the merits.

Appeal under clause 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Tyabji in Civil Revision Petition No. 476 of 1914 for revision of the decree of the Court of the Subordinate Judge of Kumbakonam in Small Cause Suit No. 1480 of 1913.

V. C. Seshachariar for Appellant.

N. S. Rangasawmi Aiyangar for *T. Narasimha Iyengar* for Respondents.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments:—*Sadasiva Aiyar, J.*—This Letters Patent Appeal is against the judgment of a learned Judge of this Court who dismissed the Civil Revision Petition filed by the defendant (petitioner and appellant) against the decree of the Subordinate Judge of Kumbakonam in S. C. S. No. 1480 of 1913.

The defendant was lessee of a garden for five years under a registered lease-deed, Ex. B. The lease term expired in 1908. Then he executed an unregistered lease-deed, Ex. A in June 1909. But that lease-deed is inadmissible in evidence for want of registration. The rent reserved for the whole garden under

* L. P. A. No. 200 of 1915. 7th March, 1916.

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Ex. B seems to have been Rs. 260 per annum. The plaintiffs originally owned one-fourth share in the garden and he purchased the other one-fourth share on 23rd October 1912 from the then owner thereof.

The suit was brought for rent due from the 1st September 1911 till 14th November 1912 at Rs. 210 per annum with interest and costs and also Rs. 50 damages for the alleged injury caused to the land by the defendant's acts. The Subordinate Judge gave a decree for Rs. 290, and proportionate costs disallowing the claim for the Rs. 50 damages.

The defendant denied that he was a tenant of the lands but it is found by the Subordinate that he did pay rent as tenant and that he has been enjoying the lands all along. It is a pity that the learned Subordinate Judge did not give a definite finding as to whether the defendant paid rent *after the expiry of the term in Ex. B* and, if so, at what rate he was paying rent and whether as mentioned in the plaint the rent was paid as mentioned in the unregistered-deed Ex. A. till the end of August 1911, There is however, the evidence of the plaintiff's 2nd witness that the defendant used to pay the rent due to his master in whose favour Ex. A. was executed. Though Ex A. is inadmissible to prove the tenancy or its terms, the fact of payment of rent by the tenant after 1908 and the receipt of rent by the landlord will not establish a tenancy from year to year the annual rent due under such tenancy being ascertainable from the amount of rent paid and received.

If then the landlord was receiving Rs. 210 rent a year from 1908 till 1st September 1911 as in the plaint and as seems to be suggested by the evidence of P. W. 2 in cross-examination, that fact establishes the tenancy from year to year at the yearly rent of Rs. 210, and we need not, as we should not, resort to Ex. A to find out the terms of the yearly tenancy. Taking it, however, that it is not proved that the defendant paid rent after the expiry of the term in Ex. B, he was a tenant holding over. In that view, he was liable for compensation for use and occupation as regards $\frac{1}{4}$th share in the property to the plaintiffs and as regards the other $\frac{3}{4}$ths share to the plaintiff's predecessors in title in respect of the other $\frac{3}{4}$ths share, between the 1st September 1911 and 23rd October 1912 till 14th November 1912. The plaintiff's claimed that under their sale deed the rent or compensation due to their

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predecessors in title between the 8th December 1911 and 23rd October 1912 for the said ¾ths share has been transferred to them under Ex. E. Mr. V. C. Seshachariar contends that such a transfer was a transfer of a mere right to sue and is therefore invalid. If, as I hold there is evidence to prove the defendant's payment of rent at Rs. 210 a year after 1908, he is a tenant from year to year at that rate and the transfer of a claim for rent due is not a transfer of a mere right to sue but a transfer of an actionable claim. If, however, he was not a tenant from year to year but what is called a "tenant by sufferance," then the question arises as to whether the right to sue such a person for compensation for use and occupation is an actionable claim or a mere right to sue. The compensation for use and occupation is, in English cases, loosely called "rent or 'fair rent' or 'occupation rent.' (See *the Metropolitan Railway Co.*, v. *Deffries* [1]). The English Courts look upon it as based on an implied contract to pay a fair rent. But it is inadvisable to extend to India the whole of the English Law of implied contract. Under the Indian contract Act, many cases of implied contracts under English Law are dealt with specially under the head of "Relations resembling those created by contract." (See *Gibson* v. *Kirk* [2] for the report of a case which speaks of an implied contract to pay rent by a party who is in, what is called, permissive occupation). In 18 Halsbury's Laws of England, 487, note (6) the action for use and occupation is said to be one based on implied contract. Under the English Law, a tenant holding over is usually called a tenant by sufferance. See also Woodfall's Landlord and Tenant (19th Edition) page 631 at the top of the page. The English Courts seem to make a distinction between a claim for compensation for use and occupation against a person who is in permissive occupation and a claim for mesne profits against a trespasser. (See also Foa on Landlord and Tenant pages 389 to 394). As Benson and Krishnasawmy Aiyar, JJ. remarked in *Subbraveti Ramiah* v. *Gundala Ramanna* [3], "it seems doubtful whether the *fiction* of a tenancy by sufferance should be kept up after the Transfer of Property Act, according to which a lease is determined by the efflux of the time limited thereby (see section 111." Under S. 116 of that Act the tenant holding over becomes

1. 2 Q. B D 387.
2. 113 E. R. 1359.
3. (1909) I. L. R. 33 M. 260 at 262.

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a tenant from year to year, only, "if the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise *assents* to his continuing in possession as lessee." I take it that mere passive failure to take steps to eject will not by itself constitute an assent to the tenant's continuing in possession as tenant from year to year. It may be that such a tenant holding over need not necessarily be credited with an intention to hold land adversely though as pointed out in *Subbraveti Ramiah* v. *Gundala Ramanna*,[1], the running of time under Art. 139 of the Limitation Act against the landlord will not be interrupted. I think that the claim for use and occupation against a person who has ceased to be the lessee owing to the lease term having expired and owing to no new relationship of lessor and lessee having been created under S. 116 is not a claim based on contract express or implied and is one sounding in damages due to the owner by a person in possession without rightful claim to remain in such possession. It is therefore a mere right to sue which cannot be transferred under the Transfer of Property Act whatever may be the English law as to such rights to compensation coming under the head of "profits" which might be transferred along with the land. See *the Metropolitan Railway Co.* v. *Deffries* [2] and *Anker* v. *Franklin* [3].

If, then, the defendant was a tenant from year to year from 1st September 1911, he ought to pay the following amounts to the plaintiffs; (*a*) rent for ¼th share from 1st September 1911 to 8th December 1911 at Rs. 210 (*i.e.*) Rs. 56; (*b*) rent from 8th December 1911 to 14th November 1912 on the whole garden at the same rate (*i.e.*) (about Rs. 196, total Rs. 252). If, however, he was not a tenant from year to year, the plaintiff will be entitled to (a) damages for use and occupation as regards ¼th share between 1st September 1911 till 23rd October 1912 at Rs. 65 a year, *i. e.*, Rs. 75—; (*b*) damages for use and occupation of the whole garden from 23rd October 1912 to 14th November 1912, *i. e.* about Rs. 20, total Rs. 95; because according to my view the damages for use and occupation of the ¾ths share between 8th December 1911 and 23rd October 1912 cannot under the Indian Law be validly transferred. (See *Seetamma* v. *Venkataramanayya* [4].

1. (1909) I. L. R. 33 M. 260 at 262.
2. 2 Q. B. D. 387.
3. (1880) 40 L. T. R. 370.
4. (1913) I. L. R. 38 M. 308.

Govinda-sawmi Pillai v. Ramaswami Aiyar.

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Whether my view that there is sufficient evidence that the defendant paid rent after 1908 till 1st September 1910 as alleged in the plaint and that therefore the defendant became a tenant from year to year on an annual rent of Rs. 210 is correct or not, I have held that a revision under S. 25 of Act IX of 1887 is a matter of discretion in this Court. (See *Gopala Iyengar* v. *Venkatakrishna Iyengar* [1]) and I am clearly of opinion that this is not a case in which it is, at all, desirable to exercise the High Court's powers of revision. The defendant who is a vakil's Gumasta had no merits whatever in the case set up by him, and he advanced (according to the Sub-Judge) false defences on the facts. I would therefore dismiss the Letters Patent Appeal with costs.

Moore, J:—I agree.

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1. (1912) M. W. N. 1227.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

R. Raghavachari ... *Appellant* * *(2nd Respondent).*

v.

M. A. Pakkiri Mahomed Rowther and others. *Respondents (Petitioner and Respondent Nos. 1 and 3 to 12).*

Raghavachari v. Pakkiri Mahomed Rowther.

*Indian Contract Act, Ss. 216, 196—Principal and agent—Ratification—Purchase by agent on his own account and contrary to directions of principal—No ratification possible—Stranger execution purchaser—*Bona fides*—Meaning of—Knowledge of appeal pending—Immaterial.*

Purchase by an agent in execution of a mortgage decree in favour of his principal, on his own account and contrary to the directions of the principal cannot be taken advantage of by the latter under S. 216 Indian Contract Act nor ratified under S. 196.

Bona fide purchasers in execution of decrees (in this case, a mortgage decree), not being decree-holders are unaffected by the decrees being subsequently reversed.

A purchaser with notice of the pendency of an appeal is not on that account any the less a *bona fide* purchaser.

The meaning of the words "*bona fide* purchaser" considered.

Appeal against the order of the Court of the Subordinate Judge of Negapatam in Miscellaneous Application No. 847 of 1912 in O. S. No. 38 of 1903 on the file of the Court of the Subordinate Judge of Kumbakonam under execution in the said Court of the Subordinate Judge of Negapatam.

T. R. Venkatarama Sastri for Appellant.

M. D. Deva Doss and *C. V. Anantakrishna Aiyar* for Respondents.

The Court delivered the following

Judgments:—*Moore, J.*—This is an appeal by 2nd respondent in the Lower Court against an order of the Subordinate Judge of Negapatam passed in execution. The circumstances which have given rise to the appeal are these:—The South Indian Export Company, Limited, obtained a mortgage decree in O. S. No. 38 of 1903 on the file of the Court of the Subordinate Judge of Kumbakonam. The 1st respondent preferred an appeal and under the decree of the High Court dated 8th April 1910, his share in the properties was exonerated. While the appeal was pending certain properties were brought to sale in execution on the 8th October 1909 and the present appellant purchased in his own name for Rs. 525, some nanja lands in Peyur which are referred to in the evidence as the Theevali lands. The appeal relates to these properties which were, it appears, subject to a prior mortgage of about Rs. 5,000, Moore, J.

* A. A. O No. 214 of 1913. 16th February 1916.

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Moore, J.

in favour of a third party, the South Indian Export Company holding a subsequent mortgage over those and other properties on which they had obtained a decree for nearly Rs. 7,000. At the time of the sale the appellant was the agent of the Company. He left the Company's service in November 1911. The 1st respondent applied to the Subordinate Judge for restitution and delivery of his 10¼/60th share of the properties which had been taken possession of by the South Indian Export Company and the appellant as purchasers at the auction sale. The decree-holder, it may be mentioned had received permission to bid at the sale. The appellant opposed the application for restitution on the ground that he had purchased the properties in Court auction not in his capacity as the agent of the Company but on his own behalf the sale certificate having been issued in his name. The Company in the Lower Court raised no objections to the 1st respondent being given his share of the lands. The Subordinate Judge found that the appellant was merely as benamidar for the Company and that 1st respondent was accordingly entitled to get his share of the lands and directed that symbolical possession should be given to him, and that a separate application should be made for the ascertainment of mesne profits.

The learned Vakil for the appellant contends that the Subordinate Judge erred in holding that the purchase was made for the Company and that in law the purchase could not be subsequently adopted as their own by the Company. Certain letters which had passed between the South Indian Export Company and their agent, the appellant, were filed. The oral evidence consists of the deposition of the appellant who was called as a witness curiously enough for the claimant (1st respondent). No evidence was offered on behalf of the South Indian Export Company. Why Mr. Simpson who was at the time Manager of the Company was not examined is not clear. We are certainly not prepared to accede to Mr. Devadoss's request that the case should be sent back to enable the Company to adduce evidence. It will be convenient to deal with the correspondence between the Company and their agent prior to the auction sale. On 18th April 1909, the appellant wrote to the Company informing them of the date fixed for the sale and asking for permission to purchase the properties in Court sale if necessary, and mentioned that bidders were not likely to buy at the auction *for fear of the Mahomadans.* In his reply, Exhibit E,

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Mr. Simpson wrote that the Company objected very much to buying properties like this in public auction and pointed out that the appellant had not explained why it was necessary for the Company to bid. He also asked him for a detailed statement of the values of the properties which the Company should bid for and what outside offers he had received. In his letter, Exhibit D1, the appellant replied that the lands were worth about Rs. 8,000 and that as there were two mortgages amounting to Rs. 12,000 on the property nobody was likely to buy them in Court auction and it was not worth while for the Company to take them in their own name. The concluding portion of the letter is as follows: "But I am making arrangements subject to your sanction, that is, let any one take this in Court auction for a low amount and conduct the suit on the first mortgage. If he succeeds in the case let him pay us Rs 4,000 or Rs 5,000 for our decree debt. Until then we have our decree in force. In case of failure, it does not matter much for us as the first mortgage amount and costs will come to more than the value of the property." In his reply, Ex. E1, Mr. Simpson wrote that he agreed to what the appellant had suggested, and that "with regard to the nanja lands" the appellant might "arrange with a third party to purchase them and conduct the suit of the first mortgagee."

It is, we think, clear from the correspondence that the Company expressly forbade their agent to purchase the Taeevali lands for the Company and that there can be no doubt from the evidence that the purchase was made by the appellant on his own behalf. It is significant that in the sale account it is stated that Raghavacharry, the appellant, purchased lot No. 1 for himself and that he has signed in his own name, whereas in the case of the other lands which he purchased on behalf of the Company he added the words "plaintiff's agent" below his signature. If the purchase had been made on behalf of the decree-holder who had obtained permission to bid, no deposit would be necessary. The appellant explains that, as he could not find any third person to purchase the lands he purchased them himself, and that there were no other bidders. He says that he had enough money with him to pay the deposit of 25 per cent. and that he borrowed the balance from his brother-in-law, but we agree with the Subordinate Judge that this statement is

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untrue; and that it is more probable that the appellant paid Rs. 525 out of the Company's funds in his hands. In Ex. A the account furnished by the appellant to the Company Rs. 525 is not however shown as having been expended on 8-10-09. The last item in the account is "amount to be recovered from Court Rs. 525."

As to what transpired subsequently the evidence is not so clear. The appellant states that after the sale he went to Madras and orally reported that he had purchased the lands himself and had an interview with his master (presumably Mr. Simpson) who said that the lands might be transferred to a third person who would fight it out with the first mortgagee. The appellant further states that there was an application to set aside the sale, and that the Manager of the Company said that the Company had a mortgage of the lands and would arrange with others for the purchase of the lands from him, and that, as he was the servant of the Company he agreed to this. It is pointed out that no mention is made of this agreement or arrangement in the appellant's counter-petition in the Lower Court, that the date of the agreement is not stated, that the appellant wrote the letters Ex. F series to the Company asking them to arrange for the payment of the kist on the lands, that in Ex. B he debited the Company on 12-1-10 with Rs. 525 the sale price of the lands which had been deposited in Court, and that he admits in his evidence that he got back the price which he paid from the Company and that the Company had the right to sell the lands. All this is, however, we think perfectly consistent with the appellant's statement which we accept, that between the date of the sale and January 1910 he agreed that the Company should arrange for the purchase of the lands from him, the appellant receiving as his commission the surplus, if any, should the lands be sold for more than the decree amount of Rs. 9,000. It is clear that not only did the Company not authorize the appellant as their agent to purchase the lands at the auction but expressly forbade him to do so. Mr. Devadoss argues that even if there was no express authorisation the Company are entitled to the benefit of the purchase and that a principal can ratify an unauthorised act of an agent. Reliance is placed on S. 216 of the Contract Act. That section, however, deals with the principal's right to the benefit gained by an agent dealing on his own account in the business of the agency

as, for instance, the case of an agent 'employed to sell, selling and securing the secured profit for himself which he must account for, *Andrews* v. *Ramsay and Co.*, [1]. S. 196 of the Contract Act is in these terms: "Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority." *Keighley Maxsted and Co.*, v. *Durant* [2], which was cited by the appellant's vakil is against the respondent. In that case it was held by the House of Lords, reversing the decision of a Majority of the Court of Appeal, that a contract made by a person intending to contract on behalf of a third party but without his authority cannot be ratified by the third party so as to render him able to sue or liable to be sued on the contract. Where the person who made the contract did not profess at the time of making it to be acting on behalf of the principal there must be on the part of the person acting without authority the express intention to contract on behalf of the other and in the absence of it there can be no ratification. No ratification is possible where the agent does not purport to act, though without authority, on behalf of his principal, *Kandasami Asari* v. *Somaskanta Ela Nidhi* [3].' Here the appellant purchased the property on his own behalf and did not profess to act on behalf of his principal. Following the ruling in *Keighley Maxsted & Co.* v. *Durant* [2], and *Kandasami Asari* v. *Somaskanta Ela Nidhi* [3], we hold that the Company cannot ratify the unauthorised act of the appellant so as to enable it to have the benefit of the purchase. We are unable to agree with the Subordinate Judge that the appellant was a mere benamidar for the Company. There is no evidence to support his finding on this point. Whatever the appellant's secret or undisclosed intention may have been, when he purchased the property, he purchased it on his own behalf. The appellant was a stranger and the purchase was not made on behalf of the decree-holder. Where a sale has really taken place in execution of the decree in force at the time, it cannot afterwards be set aside as against a *bona fide* purchaser not a party to the decree, on the ground that on further proceedings a decree has been, subsequently to the sale, reversed

1 (1903) 2 K.B. 635. 2. (1901) A. C. 240.
3. (1910) 20 M. L. J. 371.

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by an Appellate Court. *Zain-ulabdin Khan* v. *Muhammad Ashjhar Alikhan* [1]. Their Lordships point out the distinction between *bona fide* purchasers who are no parties to a decree at a sale under execution and the decree-holders themselves. If the appellant was a *bona fide* purchaser, restitution cannot be demanded from him, and the modification of the decree in appeal cannot affect its validity so far as the auction purchaser who was not a party to the decree is concerned. The circumstance that the sale took place during the pendency of the appeal of which the appellant was presumably aware is not we think material. Mr. Anantakrishna Aiyar for the 1st respondent argues that the appellant was a speculative purchaser. However this may be, the appellant was nonetheless, a *bona fide* purchaser. The first respondent's claim for restitution must be disallowed.

We accordingly allow the appeal and set aside the order of the Subordinate Judge directing that symbolical possession should be given to the first respondent. Plaintiff (2nd respondent) must pay the appellant's costs in both Courts. The respondents will bear their own costs.

Mr. Ananthakrishna Aiyar contends that the 1st respondent is at any rate entitled to his share of the sale proceeds which were paid to the decree-holder. We think he is entitled to such an order. S. 144 of the Civil Procedure Code makes it imperative on the Court of First Instance to 'cause restitution as far as may be' and for the purpose of restitution it is empowered to make any necessary order. Though the petitioner (1st Respondent) has now been found not entitled as against the Court auction-purchaser (appellant) to get back petitioner's share of the lands purchased by the appellant, he can in partial restitution, be given his 10¼/60th of the sale proceeds of that property Rs. 625, which the decree-holder has received. As the Appellate Court has got all the powers of the Court of First Instance, we shall direct the South Indian Export Company to pay that amount with interest at 6% per annum to the 1st Respondent.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J:—I entirely agree. I wish to add only a few words in regard to the contention of Mr. Anantakrishna Aiyar that a purchaser in a Court auction sale cannot be a *bona fide* purchaser if he was aware that an appeal is pending against the decree under execution.

1. (1887) I. L. R. 10 A. 166, at p. 172.

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Sadasiva Aiyar, J.

O. 41, R. 5 Clause (1) of the Civil Procedure Code states "An appeal shall not operate * * * * * * *, *nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree.*" Clause 3 of the same Order and Rule says "*no order for stay of execution shall be made*" "*unless* the court making it is satisfied' in respect of certain matters. In the present case, the Appellate Court refused stay of execution of the decree and then the sale was held. If everybody who knows of an appeal and who comes to bid at the execution sale ceases to be a bidder in good faith, and when his bid is accepted, he cannot claim the position of a *bona fide* purchaser, it will practically nullify the provisions of O. 41, R. 5. Not only can execution seldom take place under those conditions (as the judgment-debtor might be expected to warn off all bidders by giving them notice of the appeal) but the judgment-debtor himself will in many cases, sustain substantial loss and injury by the scaring away of honest bidders and by a few litigious persons alone remaining as bidders.

Reliance was placed by Mr. Anantakrishna Aiyar on the case of, *Arthanari Chettiar* v. *Nagoji Rao* [1], for his above contention. There, Sir Arnold White, C. J. and Sankaran Nair, J. sent down the case to the District Judge to submit a finding as to the question whether the appellant was a *bona fide* purchaser in good faith at the auction sale. The District Judge seems to have thought that "good faith" implied also ignorance of the pendency of an appeal against the decree which are being executed and hence in his finding he stated that the property was purchased by the purchaser for fair value, that he purchased it for his own benefit and also that he did not know of the pendency of the appeal. On the return of that finding, the learned Judges accepted it and allowed the appeal dismissing the application of the defendant for restitution. I cannot treat the above as embodying a decision by the learned Judges that ignorance of the pendency of an appeal is necessarily a constituent element of the good faith of the Court auction-purchaser. I think that the words "good faith" merely indicate such things as absence of participation in the frauds and irregularities, if any, committed by the decree-holder, absence of the relation of agent or benamidar to the decree-holder, absence of any conduct such as scaring away other bidders by false statements and so on.

1. (1912) M. W. N. 513.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar, and Mr. Justice Moore.

K. P. Alagappa Iyengar ... *Appellant** *(Petitioner).*

v.

Mangathai Ammangar and others ... *Respondents (Respondents).*

Alagappa Iyengar v. Mangathai Ammangar.

Hindu Law—Guardian—Father—Power of, to appoint for person and property of minor son—Not for joint or trust property—Will—Burden of proof—Thirumaligai—*Private property.*

A Hindu father can appoint a guardian to the person of his minor son but he cannot appoint a guardian for his property when the property is joint family property of the father and the son or trust property.

Thirumaligais are private and not trust properties.

The burden of proving a will is on the party setting it up.

Appeal against the order of the District Court of Tinnevelly dated the 15th September 1914, in O. P. No. 513 of 1913.

T. Rangachariar for Appellant.

The Ag. Advocate General (S. Srinivasa Aiyangar) with him *N. S. Rangaswami Aiyangar* for Respondents.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments:—*Sadasiva Aiyar, J.*—This appeal has arisen out of an application filed in the District Court of Tinnevelly under Ss. 39, 10 and 7 of the Guardians and Wards Act of 1890. The petitioner in the District Court is the appellant before us. The prayers in the petition are *(a)* that the 1st respondent, namely the mother of the minor boy, may be declared the sole guardian of the minor and his estate, removing respondents 6, 7 and 8 if they should be deemed to have been appointed by the minor's father; *(b)* if necessary the petitioner or the 4th Respondent or any other fit and proper person may be appointed by the Court as guardian solely or with the 1st respondent for the minor's estate for both his person and estate, and *(c)* other fit and necessary orders be made.

Now the minor's father died on the 13th December 1911 and the Respondents No. 6, 7 and 8 set up that themselves and the 1st Respondent have been appointed by a will executed by the minor's father on the 11th December 1911 as the guardian of the person and properties of the minor. That will is Ex. I in the case. As S. 7, Cl. 3 of the Guardians and Wards Act enacts

* A. A. O. No. 363 of 1914. 29th Feb. 1916.

Alagappa Iyengar v. Mangathai Ammangar.

S. Sasiva Aiyar, J.

that where a guardian has been appointed by will, an order under that section declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed and declared by the will have ceased under the provisions of the Act. the learned District Judge first considered the question of fact whether the will was genuine or not. I think that on that question the District Judge came to a correct conclusion though I do not agree with some of his observations which seem to imply that burden of proving that the will was not genuine lay in the first instance on the petitioner-appellant. Whoever puts forward a will as genuine or supporting his contentions ought to prove it and cannot throw the burden of proving the negative on the opposite party. See *Krishnamachariar* v. *Krishnamachariar* [1]. On the evidence however, as I said, I agree with the learned District Judge that the will is genuine. It is attested (among several others) by the testator's sister's husband and his son-in-law. It was produced by the widow (1st Respondent) for registration to the Sub-Registrar and till the 28th June 1913 (See Ex. VII) she admitted that it was a genuine and valid will. The evidence of the contesting Respondent's witnesses Nos. 1 to 4 satisfactorily establishes the genuineness of the will and that it was read out to the testator while he was of sound mind before he signed it. From the papers Ex. F series it no doubt appears that the testator signed some blank papers with a view to having his testamentary intentions written over those signatures. But it is proved that a draft will had already been prepared under the instructions of the testator and even if the first five sheets of the will, Ex. I, had been signed in blank by the testator for the purpose of the fair will being written above those signatures and (if necessary) above the signatures in the Ex. F series sheets, I am clearly satisfied that the will as a whole after it had been faircopied was submitted to the testator and was signed by him in at least the 6th and 7th sheets, after it had been completed. And that is sufficient to make the will legally valid. See *Namberumal Chetti* v. *Pasumarthy Kannia Chetti* [2]. The evidence of the petitioner's witnesses that the testator was too ill on the date of the will to understand its contents is absolutely worthless. The reason why the widow (1st respondent) and the petitioner (who had himself admitted the validity of the will by his attestation of Exs. VIII

1. 1913) I. L. R. 38 M. 166 ; 24 M. L. J. 577. 2. (1915) 28 I. C. 959.

Alagappa Iyengar v. Mangathai Ammangar.

Sadasiva Aiyar, J.

and IX and under whose advice Exs. VIII and IX were presented to the police according to the evidence of the (1st respondent) now deny the validity of the will is clear from the statements in paragraphs 5 to 8 of Ex. VII. The way in which the petitioner's 1st witness (a petty clerk of the testator and his widow) contradicted his own statements in Ex. X and XI is also significant. I do not think it necessary to go into further details in respect of the evidence in regard to the genuineness of Ex. I. The explanation for not having it registered during the testator's life time seems to me to be not at all unreasonable or suspicious and might be accepted under the circumstances.

The next question is whether Ex. I is a will that has to be set aside under S. 39 of the Guardians and Wards Act. It need not and could not be set aside if the testator had no legal power to appoint a guardian for the property by will. Before going into that question there is a preliminary point for decision namely whether the will did appoint guardians (*a*) for the minor's person, and (*b*) for the minor's properties. After some hesitation, I have come to the conclusion that it does appoint the widow and the Respondents Nos. 6,7 and 8 as guardians for both the person and property of the minor. The testator calls them "guardians" in the will and as he directs them to maintain the boy, perform his *upanayanam* to instal him in the Acharya's throne and so on. I do not think he meant to make any distinction between the guardians of the person and the guardian of the properties by the terms of his will Then comes the question as to whether the appointment is valid, first as regards the person and then as regards the properties. I think I ought to follow the case in *Dr. Albrecht* v. *Bathee Jellamma* [1], where it was decided that a Hindu father has got the power to appoint by will a guardian of the person of his minor child. Next as regards the properties there are two branches of the question to be considered. The first branch relates to the case where the properties disposed of by the will are alleged to be the ordinary private ancestral properties of a Hindu father; and the second branch relates to the case where (as is alleged in the present will) the properties belong to a mutt or a religious institution. On the 1st branch of the question, there is a decision of this Court reported in *Kanakasabai Mudaliar* v. *Ponnusami Mudaliar* [2], which clearly lays down that as regards

1. (1911) 22 M. L. J. 247. 2. (1913) 21 I. C. 848.

Alagappa Iyengar v. Mangathi Ammangar.

Sadasiva Aiyar, J.

properties which survive to the minor son of a Hindu testator as ancestral family property on the death of the father, the father has no power to appoint a guardian. That case has been followed by a single Judge of this Court in *Krishna Aiyar* v. *Chakrapani* [1], though the case in *Soohah Doorhga Tala Tha* v. *Raja Neelanand Singh* [2] which was followed in *Dr. Albrecht* v. *Bathee Jellamma* [3] seems to hold a different view. The actual decision in *Dr. Abrecht* v. *Bathee Jellamma* [3] established the validity of the appointment by the father of the guardian only of the person of his minor child. One of the learned Judges who was a party to the decision in *Dr. Albrecht* v. *Bathee Jellamma* [3] was also one of the Judges who remanded the case reported in *Kanakasabai Mudaliar* v. *Ponnusami Mudaliar* [4] for a finding to the Lower Court on the issue as to self-acquisition which finding would be required only on the view that as regards joint family properties, a Hindu father has no right to appoint a person by will to be the guardian of such properties on behalf of the minor son. I would therefore follow the decision in *Kanakasabai Mudaliar* v. *Ponnusami Mudaliar* [4] and hold that if these properties were the ancestral private properties of the testator, appointment by will of a guardian of such properties was invalid. If they were, however, properties dedicated to a religious trust then no question of guardianship at all arises and no question therefore of removing a testamentary guardian. I might however state that, I am strongly of opinion that the properties belonging to this *Thirumaligai* and the similar three other *Athan Thirumaligais* are private properties and not trust properties and I prefer to follow the decision of Sir Subramania Iyer and Davies, JJ. in A. S. No. 12 of 1903 (filed as Ex. L in this case) in preference to the decision (filed as Ex. XVIII) in A. S. No. 101 of 1873.

Finally, there is the question whether "it is for the welfare of the minor" (see S. 7 of the Act) that a guardian of the person or property or both should be appointed; and whether the guardian of the person appointed by the will (if such appointment is held valid) should be removed for the purpose of the appointment by the court of a guardian according to S. 7 of the Act. If the appointment of the guardian of the property by the will is invalid

1. (1915) 29 I. C. 475.
2. (1867) 7 W. R. 74.
3. (1911) 22 M. L. J. 247.
4. (1913) 21 I. C. 848.

Alagappa Iyengar v. Mangathi Ammangar.

Sadasiva Aiyar, J.

as I have held, the mother becomes guardian of the properties and I see no necessity why the mother should be appointed again by the court. The petitioner is clearly not a person fit to be the guardian both by reason of his character as appears from his evidence and the reason of his position in life as mentioned by the District Judge. Similar remarks apply to the suggested appointment of the 4th "Respondent. As the boy I believe is almost sure to become an Achariar-Preceptor as soon as he gets his *upanayanam* performed, I do not think it necessary in his interests to appoint a guardian for his person or property so as to advance the age of majority of the boy from 18 to 21 I would, in the result, dismiss the appeal with costs of the respondents Nos. 6, 7 and 8, the charges advanced against whose management of the estate were withdrawn in the Lower Court.

Moore, J:—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

Gopammal ... *Appellant* (1st Respondent)*

v.

V. Srinivasa Aiyangar and another. *Respondents, (Petitioners).*

Gopammal v. Srinivasa Aiyangar.

Guardians and Wards Act, Ss. 7, 34 (a), 39 (e) 50 (b) and (d)—Civil Rules of Practice, Rules 240, 241, 242—Forms 92, 94—Preliminary order of approval of guardian, approval of security and final appointment of guardian—Ultra vires—*Order appointing guardian—Insufficient security—No appeal on insufficiency of security—Guardians and Wards Act, S. 47 (a).*

No appeal lies against an order by the District Court accepting a security furnished by the guardian under S. 34 (a) of the Guardians and Wards Act, on the ground of insufficiency or otherwise, such an order not being one comprised in S. 47 (a).

Gopammal v. *Srinivasa Aiyangar* 1, followed.

Per Sadasiva Aiyar, J.:—(Moore J. dissenting) Rules 240 to 242 and forms 92 and 94 of the Civil Rules of Practice (Madras) so far as they require the appointment of the guardian to be postponed to the furnishing and approval of the security are *ultra vires*, as they are inconsistent with Ss 7, 34 (a), 39 (e) and 50 of the Guardians and Wards Act.

The Act only contemplates, first the appointment of the guardian under S 7, then his giving security if so required under S. 34 (a) and his liability to be removed under S. 39 (e) if he fails to furnish security contumaciously

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* A. A. O. No. 296 of 1914. 9th March, 1916.

1 (1914) 28 M. L. J. 96.

Gopammal v. Srinivasa Aiyangar.

Per Moore, J.:—The procedure prescribed in the Rules of Practice and forms and followed in the mofussil does not contravene any express provision in the Act and is not *ultra vires*, as the first order is an order of appointment of the guardian conditional on security being furnished.

Appeal against the order of the District Court of Ramnad at Madura in O. P. No. 437 of 1912.

J. L. Rosario and *A. Swaminatha Aiyar* for Appellants.

C. S. Venkatachariar and *P. S. Vythinatha Aiyar* for Respondents.

The Court delivered the following

Sadasiva Aiyar, J

Judgments:—*Sadasiva Aiyar, J.*:—The first respondent in the Lower Court is the appellant before us. She is the widowed mother of a minor boy. On the application of the minor's father's 1st cousin, one V. Srinivasa Aiyangar has been appointed as guardian of the minor's property, superseding her in the interests of the minor, so far as *the guardianship of his properties is concerned.*

The order appointing Srinivasa Aiyangar as guardian was passed on the 19th day of January 1914, under S. 7 of the Guardians and Wards Act. S. 34 of the Act provides that "where a guardian of the property of a ward *has been* appointed.......... he shall, (*a*) if *so required by the Court,* give a bond.........to the Judge of the Court......engaging duly to account for what he may receive in respect of the property of the ward." It seems to me clear that it is only *after* the appointment that the person appointed can be required under the Act to give security under S. 34 (*a*). If he contumaciously fails to give security, S. 39 clause (*e*), empowers the Court to remove him from the guardianship.

S. 50 of the Act empowers the High Court to make Rules (among other things) "as to the security to be required from guardians" clause (*b*) and as to the circumstances in which such requisitions as are mentioned in clauses (*a*) to (*d*) of S. 34 should be made." (Clause (*d*) of S. 50). The rules should, however, be "consistent with the Act" (that is the Guardians and Wards Act). I think it would be inconsistent with the Act to impose a duty on the District Court to require such security *before* the appointment of a guardian. The following are portions of three of the Rules framed by the High Court under the Act.

R. 240......"unless the Court for reasons to be accorded in writing otherwise orders, a person *appointed guardian of the property of the minor,* shall give security etc."

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R. 241......" when security is to be given, the Court shall determine the actual amount thereof and may examine the proposed sureties and adjourn the further hearing of the application to a fixed day as in Form No. 92."

R. 242 "The proposed guardian and his sureties.........shall execute a security bond etc.".............." At the adjourned hearing, the Judge.............*shall pass an order in Form No. 94 etc.*"

Form No. 92 mentioned in R. 241 is headed "*interim* order on application for guardian of the property." It says (in part) ....the Judge *having approved of C. D.* as a proper person to be appointed guardian of.........the property of E.F. the minor.........." "It is ordered that the said C. D. do............ bring into Court a bond..............and the further hearing.........is adjourned to........."

Form No. 94 referred to in Rule No. 242 is headed "*Final order* appointing a guardian of person and property.". It says (in part) "..........the Judge having approved of C. D..........as a proper person to be appointed guardian of the.........property E. F. the minor and the said C. D. having given security.. .... which has been approved by the Judge and filed in Court, it is ordered as follows:—

1. That the said C. D. *be appointed* guardian of..... ...the property of the said minor etc."

The Act does not provide for two orders, namely, an "*interim* order" of "approval" and a "Final order" of "appointment" of the guardian of property nor does it postpone the appointment till security is furnished. On the other hand, the appointment has to precede the requisition for and the furnishing of security. So far as the Rules and Forms quoted by me above require the appointment to be postponed to the furnishing and approval of the security (that is, require the security to be furnished and approved of before the appointment is made), they seem to be *ultra vires*.

In the present case, an order of appointment of guardian of property was made (as I said before) by a judgment of the 19th January 1914, the language of the judgment being "I appointed him (Srinivasa Aiyangar) accordingly as guardian of the property of the minor on a security of Rs. 30,000." This judgment of January 1914, was treated by the present appellant (the minor's mother) as an order of appointment made under S. 7

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and she appealed against it to the High Court (A. A. O. 59 of 1914). That appeal 59 was dismissed by the High Court on 16th December 1914.

Meanwhile, the District Court seems to have treated its judgment of January 1914, as only an *interim* order *approving* of Srinivasa Aiyangar as guardian under the Rules and the Forms I have already referred to and treated Srinivasa Aiyangar even after the judgment as a "proposed" guardian and not as an "appointed" guardian called on him to furnish security as such proposed guardian. He furnished sureties accordingly at the end of January 1914 and a direction was given on 4th February 1914, to the Nazir of the Court to have the security tested. The securities having stood the test and having been approved by the District Judge, an order was passed on 26th September 1914, the material portion of which is

"That the said V. Srinivasa Aiyangar has been *appointed* guardian of the property of the said minor etc."

Thus, though there was an appointment order in January 1914, of the same Srinivasa Aiyangar as guardian and though that order was under appeal (and was eventually confirmed in December 1914), a sort of final order of appointment was passed in September 1914. The mother of the minor has taken advantage of the passing of the said second order of September 1914, to present the present appeal 296 of 1914 against it on the ground that sufficient security has not been given by the guardian and hence the appointment of September 1914, should not have been made.

I am clear, in the first place, that the order of January 1914, is the order of appointment which was legally passed under S. 7 of the Guardians and Wards Act and is itself a final order of appointment and that the so-called final appointment of September 1914, is not provided for by law and cannot be appealed against as an independent order. In the second place, it has been held in the judgment in the former A. A. O. No. 59 of 1914, between these same parties that no appeal lies under S. 47 of the Act against acts done by the Court under S. 34 of the Act and as questions relating to the furnishing of security come under S. 34 clause (*a*) this appeal is unsustainable. Without prejudice therefore to any steps which the appellant may be entitled to

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take or has taken under the Act in the District Court itself in respect of the alleged inadequacy of the security, I would dismiss the appeal with costs.

Moore, J.

Moore, J.:—I agree that no appeal lies in this case, but desire to add a few words.

On January 19th, 1914, 1st respondent V. Srinivasa Aiyangar was appointed guardian of the property of the minor on a security of Rs. 30,000.

The present appellant, the mother of the minor appealed against the order to the High Court and the appeal was dismissed on 16th December 1914. While the appeal was pending the District Judge following the practice which obtains in the mofussil and which is in accordance with the rules framed by the High Court called upon the guardian to furnish security which was tested in the usual way by the Nazir.

The security having been found to be sufficient was accepted by the District Judge, and the following order was passed on 26th September 1914 : " The Judge having approved of V. Srinivasa Aiyangar, son of Venkatrama Aiyangar of Pandalgudi as a proper person to be appointed guardian of the property of minor Gopala Krishna Naick and the said V. Srinivasa Aiyangar having given security by entering into a bond with his surety, dated 9th day of September 1914, which has been approved by the Judge and filed in Court, it is ordered as follows :—"That the said V. Srinivasa Aiyangar be appointed guardian of the property of the said minor." With all deference to my learned brother I do not think that the rules framed by the High Court to which he refers can be regarded as *ultra vires*.

It is true that it is under S. 7 of the Guardian and Wards Act that the appointment order is made. This section which appears at the beginning of Chapter II of the Act and is followed by other sections which lay down the procedure to be followed when an application is made to a Court to appoint a guardian, the matters which the Court has to consider when appointing a guardian and so on, provides that the Court may make an order appointing a guardian if it is satisfied that it is for the welfare of a minor that an order should be made. The section is silent as to the furnishing of security. S. 34 which occurs in Chapter III dealing with the rights, liabilities and duties of guardians provides that when a guardian of the property of a ward had

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been appointed or declared he shall, if so required by the Court, furnish security. Rule 240 says that unless the Court for reasons to be recorded in writing otherwise orders a person appointed guardian of the property shall give security.

The practice in the mofussil is this: when a guardian of the property is appointed a time is fixed for his furnishing security. The appointment is made conditional on security being furnished. If the guardian fails to do so, or if the security tendered is insufficient the petition is dismissed. The formal order of appointment is not signed and the petition is treated as pending until the guardian has furnished the required security. This procedure appears to be correct and does not, I think, contravene any express provisions in the Act. As pointed out by my learned brother the Act does not provide for *interim* or final order for the appointment of a guardian, and does not appear to contemplate the postponing of the appointment order till security is furnished. But suppose a guardian fails to furnish security or gives insufficient security. There does not seem to be any provision in the Act which authorises that Court to cancel the appointment order in such a case. It is only in cases where the guardian fails to deliver the statement required under clause (*b*) of S. 34 or to exhibit accounts as required by Court that he can be prevented from continuing under S. 45 of the Act. S. 39 provides that a guardian may be removed for certain causes. Sub. Cl. (*e*) refers to the contumacious disregard of any provision of the Act or any order of the Court, but a guardian who fails to furnish security perhaps for unavoidable reasons or is unable to furnish sufficient security can hardly, I think, be said to be acting in contumacious disregard of the order of the Court.

However this may be, it is clear, I think, that the present appeal which is directed against the order of the District Court dated 26th September 1914, under S. 34 (a) of the Act accepting the security furnished by Srinivasa Aiyangar is incompetent. No appeal lies under S. 47 (a) of the Act against such an order. See *Gopammal* v. *Srinivasa Aiyangar* [1]. I agree that the appeal should be dismissed with costs without prejudice to any steps which the appellant may be entitled to take in the District Court in respect of the alleged inadequacy of the security offered by the 1st respondent.

1. (1914) 28 M. L. J. 96.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Coutts Trotter and Mr. Justice Seshagiri Aiyar.

Rama Rao and another .. *Appellants** (*Plaintiffs*)

v.

Kuthiya Koundan *alias* Marappa Gounden and others *Respondents* (*Defendants 1 to 9, 11 to 15, 17, 20 to 57, 59 to 63 and legal representatives of the 58 defendants*).

Rama Rao *v.* Kuthiya Koundan *alias* Marappa Gounden.

Hindu Law—Reversioner—Burden of proof—Proof of relationship and non-existence of other heirs to the best of his knowledge—Burden of proving nearer relationship on defendant—Inheritance—Samanodaka—Confined to 14 degrees—Gotraja not preferred to Bandhu unless shown to be descended from common ancestor.

It is incumbent on a plaintiff seeking to succeed to property as a reversioner affirmatively to establish the particular relationship which he puts forward and he is also bound to satisfy the court that to the best of his knowledge, there are no nearer heirs, but he cannot be expected to do anything more and it is for those who claim that their kinship is nearer to prove that relationship.

Secretary of State v *Subraya Kanta* [1] followed.

Samanodaka relationship for purposes of inheritance does not extend beyond 14 degrees.

A gotraja can in no circumstances be preferred to a Bandhu when he is unable to trace his descent from a common ancestor

Vaidynatha Dikshityam referred to.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Trichinopoly in A. S. No. 265, 325 and 385 of 1912, preferred against the decree of the Court of the District Munsif of Karur in O. S. No. 628 of 1910.

The facts are fully stated in the judgment.

C. V. Ananthakrishna Aiyar and *K. R. Rangaswami Aiyangar* for Appellants.

The Ag. Advocate-General, T. R. Ramachandra Aiyar, T. R. Venkatarama Sastri, N. Rajagopalachari and *K. S. Ganesa Aiyar* for Respondents.

The Court delivered the following

Judgment:—The suit is by the plaintiffs as reversioners to recover possession. The last male owner was Venkataramana Aiyar who died some forty years ago. His widow Tulasi Ammal died in September 1908. The plaintiffs claim to be the sister's sons of Venkataramana Aiyar.

* S. A. No. 2383 of 1913. 1st February 1916.

1. (1915) M. W. N. 962.

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The defendants are alienees from Tulasi Ammal. They denied the plaintiffs' relationship to the last male owner and pleaded that one Ranga Aiyar was the nearer heir, being a Dayadi. They also claimed that some of the properties were Tulasi Ammal's self-acquisition and that as regards the others their alienation was for justifiable purposes.

The District Munsif held that there were no nearer heirs than the plaintiffs whom he found to be the sister's sons of the deceased male owner, and that most of the alienations were not binding on them. He gave a decree for the major portion of the properties in the suit.

On appeal, the Subordinate Judge, without determining whether the plaintiffs were heirs, was of opinion that the plaintiffs should prove affirmatively that there were none nearer than themselves. He discussed the oral evidence given for the plaintiffs and defendants and stated: "on the above evidence of defendants' witnesses 1 to 3 and the admissions of plaintiffs' witnesses 2,3,6,8,10,13, and 14, I hold that it is made out that Ranga Aiyar and others are dayadies of the deceased Venkataramana Aiyar." It should be mentioned that this Ranga Aiyar has not gone into the witness box to prove his relationship. The conclusion of the Subordinate Judge is "As I find that the plaintiffs have not proved that there are no dayadies of Venkataramana Aiyar now alive, whereas it is proved on defendants' side that Ranga Aiyer and others of Pallapalyam are alive, the 1st point should be found in the negative and against the plaintiffs." In the result, the decree of the District Munsif was reversed. Hence this second appeal.

In the first place, we are unable to agree with the Subordinate Judge in his view of the burden of proof. It is no doubt incumbent on a plaintiff seeking to succeed to property as a reversioner affirmatively to establish the particular relationship which he puts forward. He is also bound to satisfy the Court that to the best of his knowledge there are no nearer heirs. He cannot be expected to do anything more. It is for those who claim that their kinship is nearer than that of the plaintiffs to prove that relationship. The decision in *Gridhari Lall Roy* v. *The Bengal Government* [1] which is relied on as compelling plaintiffs in similar circumstances to prove by positive evidence

1. (1868) 12 M. I. A. 448.

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that by process of elimination they are the only possible claimants, has been very much misunderstood. When the facts of that case are fully understood, no such proposition is deducible from it. We agree with the view taken by one of us on this question in a recent case, *Secretary of State for India* v. *Subraya Kanta* [2]. We think the lower Court was wrong on this point.

It was argued by Mr. Venkatarama Sastriar that the finding of the Subordinate Judge amounts to saying that Ranga Aiyar and others referred to exclude the plaintiffs as samanodakas. On examining the evidence relied on by the Subordinate Judge, we find that no definite relationship is deposed to and that beyond saying that bathing pollution was observed, no tangible circumstance is spoken to establishing the relationship. Mr. Rajagopalachariar who followed ventured to argue that *samanodakaship* connoted all gotrajas and that as there is evidence on which the court below is entitled to find on this point, we should not interefere with the finding. As this argument raised an issue of considerable importance, we allowed the learned pleaders on both sides a further opportunity to examine the Hindu Law texts bearing on the question.

We are indebted to Mr. Ramachandra Aiyar for the succinct summary he has given us of the authorities on the second occasion. There can be no question that Manu includes in the term 'Samanodaka' all persons belonging to the same gotra. "The sapinda-relationship is extinguished in the seventh generation; Samanodaka-relationship lasts for all eternity, being extinguished only when the name and gotra are not known." Yagnavalkya in sloka 135 says that the gotrajas come before the bandhus. "The wife, daughters, both parents, brother and likewise their sons, gotrajas (gentiles); bandhus (cognates); a pupil and a fellow-student". Vignaneswara in his commentary (Mitakshara, Chapter II, S. 5 placitum (6) says:—"If there be none such, the succession devolves on *Samanodakas*, and they must be understood, to reach to seven degrees beyond sapindas, or else as far as the limits of knowledge as to birth and name extend. Accordingly what Manu says: "The relationship of the sapindas ceases with the seventh person: and that of *Samanodakas* extends to the fourteenth degree; or *as some affirm*, it reaches as far as the memory of birth and name extends. This is signified by gotra."

2. (1915) M. W. N. 662.

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It is clear from the above passage that neither Vignaneswara nor Brihat Manu gave their own sanction to extending the meaning of the term *samanodaka* to descendants beyond the fourteenth degree. The strong inclination towards unlimited heirship which characterised the writings of Manu and the Rishis did not find equal favour with the commentators. These latter who understood the sentiments of the people attached considerable importance to the customs that had grown up since the ancient Rishis gave the law. It is no wonder therefore that Vignaneswara makes a halting allusion to what others say on the definition of the term *samanodaka*. He knew that persons belonging to the same gotra would not necessarily trace their descent from a common ancestor. It is common knowledge that persons of the same gotra belong to different sakhas. Some may be *Yajur Vedis*, some Rig or *Sama Vedis*. Further Vignaneswara must have felt that people were more inclined to favour nearer blood relationship than descent in the same agnatic line however remote. We are therefore of opinion that the Mitakshara does not enunciate the theory that *Samanodaka* relationship extends beyond the fourteenth degree; and as that authority is paramount on questions of inheritance in Southern India, we must hold that this relationship ceases with the fourteenth. Vaidyanatha Dikshitar, an author of great repute and authority in Southern India in the *Asoucha Kanda* restricts the term *samanodaka* to persons who come within fourteen degrees from the common ancestor. This author lived within 500 years and is held in great veneration all over the Presidency; and he apparently gives expression to the traditions of the people among whom he lived.

There is another point on which our conclusion against the view of the Subordinate Judge may be sustained. Even accepting the interpretation which Brihat Manu ascribes to others it is clear that unless a person is able to point to a common ancestor in the line of gotrajas, he is not entitled to come before bandhus. Both Manu and Yagnavalkya speak of *janma* and *nama* (*i.e.*,) the gotra and the name. In the Telugu countries of Madras, the name is indicated by the house name or the *intiperu*. This is not in vogue in the southern districts. Even there people speak of the Vamsam to which they belong. This would lead to tracing descent to a common ancestor. It would be

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something specific to go by. In this case no attempt has been made to show, that Venkataramana Aiyar and Ranga Aiyar and the others who gave evidence had either the same house name or belonged to the same Vamsam.

As regards the decided cases *Bai Devkore* v. *Amritram Jamiatram* [1] is the only one which in any way supports the respondents' contention. In that case, the common ancestor was traced. This view of the Bombay Judges apparently did not find acceptance in Madras as we have ascertained that Subramania Aiyar and Boddam, JJ. did not follow it in A. S. No. 120 and 124 of 1902. The observations of the Judicial Committee in *Bhyah Ram Singh* v. *Bhyah Ugur Singh* [2], are very general. Their Lordships had not to consider the meaning of the term *Samanodaka* in that case. *Kutti Ammal* v. *Radhakrishna Aiyar* [3], and *Gridhari Lall Roy* v. *The Bengal Government* [4], only lay down that before the property escheats to the Crown all possible *relations* should be exhausted. The exact point at which *Samanodaka* relationship ceases was not in question in these cases. *Ram Baran Rai* v. *Kamta Prasad* [5], is only authority for the way in which the fourteen degrees are to be computed. On the other hand in the case from which *Kalka* v. *Mathura Prasad* [6], was the appeal heard by the Judicial Committee, the view taken was that *Bai Devkore* v. *Amritram Jamiatram* [1], had gone too far. *Naraini Kuar* v. *Chandi Din* [7], upholds the restricted construction of the term *Samanodaka.*

Among the text writers, the general tendency is to confine the relationship to the fourteenth degree, although some would have it that so long as there is a possibility of common ancestor being traced; the gotraja would exclude the bandhus. It has to be remembered that this indefinite extension of the meaning of the term is calculated to induce parties to place before the Court evidence of a very dubious and unreliable character.

On the whole we are of opinion that on authority and for reasons of expediency, it is not desirable to extend the meaning of the term '*Samanodaka*' to persons beyond the fourteenth degree

1. (1886) I. L. R. 10 B. 372.
2. (1876) 13 M. I. A. 373 at pp. 390. and 393.
3. (1875) 8 M. H. C. R. 88.
4. (1868) 12 M. I. A. 448.
5. (1910) I. L. R. 32 A 594.
6. (1908) I. L R. 30 A. 510
7. (1886) I. L. R. 9 A. 466.

of relationship to the deceased; and that under no circumstances should a gotraja be preferred to a bandhu when the former is unable to trace his descent from a common ancestor.

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As the Subordinate Judge has disposed of this case on a wrong view of the burden of proof, his decree must be reversed and the appeal will be remanded to the permanent Subordinate Judge of Trichinopoly for disposal on the merits with reference to the foregoing observations, costs to abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Napier.

Messrs. Morgan and Son ... *Appellants * (Plaintiffs).*

v.

N. P. Fernandez ... *Respondent (Defendant).*

Registration Act Ss. 17, 49 —Agreement to lease—By correspondence—Registration essential.

Morgan and Son v. Fernandez.

Where an agreement to lease a certain immovable property was effected by two letters, one constituting the proposal, and the other, the acceptance and relying upon those letters a suit was instituted for specific performance of the agreement.

Held that the letters could not be used to prove the agreement as they had not been registered.

S. 17 Cl. (d) of the Registration Act applies not only to leases effected by a single document but also those effected by correspondence.

Second Appeal against the decree of the District Court of South Canara in A. S. No. 145 of 1913, preferred against the decree of the Court of the District Munsif of Mangalore in O. S. No. 401 for 1911.

Mr. K. N. Aiya Aiyar and *B. Sitarama Rao* for Appellant.

K. Yegnanarayana Adiga for Respondent.

The Court delivered the following

Napier, J.

Judgments:—*Napier, J.*—The question raised in this second appeal is whether the four letters A, B, C. and D, or alternatively, the two letters A and B require registration under Ss. 17 and 49 of the Registration Act, S. 17, Sub-S. (1) requires that "the following documents shall be registered," namely, among them clause (a) "leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent." Under the definition Section Sub-S. 7 "'lease' includes an agreement to lease." There is a proviso to S. 17, Sub-S. 2 which excepts some documents which would otherwise come under cls. (b) and (c) and also distinguishes certain classes of documents which

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* S. A. No. 898 of 1914. 22nd Feb. 1916.

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Napier, J.

might otherwise have been thought to fall under either of those two classes. One of these clauses is (5) "any document not itself creating etc. any right, title, etc. but merely creating a right to obtain another document which will when executed create such right, etc." It has been held by a Full Bench of this Court in *Narayanan Chetty* v. *Muthiah Servai* [1] that as cl. (5) has not been applied by Sub-S. (2) to leases the legislature must have had in its mind that documents with regard to leases cannot "merely create a right to obtain another document" and so are unsuited for the application of cl. 5 and that the fact of their exclusion from that clause and the specific inclusion of agreements to lease among 'leases' in the definition section indicates that agreements so long as they settle the terms of the lease or leases, whether they contemplate the creation of another document or not, are leases within the meaning of S. 2. That decision is of course binding on us. It is of the greatest importance in considering the question raised in this appeal because if the contention for the appellant is correct it will be perfectly easy to create valid leases without the necessity for registration. Where the legislature has desired to exclude documents creating particular rights it has specifically mentioned them. (*Vide* several clauses to Sub-S. 2). Subject to those exceptions the policy indicated by S. 17 is that all other documents creating rights in immovable property as distinguished from documents merely entitling parties to obtain a document creating such rights should be registered. Mr. K. N. Aiya, however, relies on certain cases which have put a limited construction on S. 17. His argument is that the words in S. 17 Sub-S. (1) 'the following documents' only apply to cases where the right is created by a single instrument. The first answer to that contention is that the word 'instrument' has been omitted from Sub-S. 1 (d) although it appears in the other clauses of the sub-section. It is not, "instrument of lease" as we have "instrument of gift," but "lease." This difference of language has not, as far as I am aware, been noted in any of the decided cases. The next answer is that the word 'documents' in the section is certainly of itself wide enough to cover more than one letter creating a lease. Certainly there is authority for the proposition, but I am unable to accede to it. On principle there can be no reason why an agreement for lease created by a

1. (1910) I. L. R. 35 M. 63. s. c. 21 M. L. J. 44.

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letter setting out the terms and endorsed 'accepted' should require registration and the same transaction embodied in two letters should not, and I cannot see where the practical difficulty lies in registering two or more letters constituting the contract. The authority relied on is an unreported case of this court, Appeal No. 201 of 1908 where the learned Judges rely on certain other cases for the proposition that if there is no one instrument which can be regarded as a lease, then S. 17 has no application. I have examined those cases, which are relied on by the appellant before us also, and with the very greatest deference to the learned Judges I do not think they support the proposition. One of them is a decision of this court, *Rajah of Venkatagiri* v. *Narayana Reddi* [1], which being a decision of a Full Bench would of course be binding on us. What was decided in that case was that S. 49 did not apply to the facts of the case, *vide* page 458 where the learned Judges say that the document may be admitted to prove the contract and the damages occasioned by the breach of it. This decision is explained in the judgment of the Bench before whom the case came, at page 460 where the Court uses the following language: "This is not a suit brought upon the *kabuliat* and *cowle*, but "a suit upon a breach of an implied contract by the defendant "to do that which it was necessary for him to do in order to "give effect to the agreement which he had entered into with "the plaintiff. The other unregistered documents that have been "put in showing the terms of the lease, have not been put in to "enforce the lease, but must be deemed to have been put in "simply as evidence of the character of the breach of agreement "by the defendant, and as a basis for calculating the measure "of damages, neither of which things can, in the least, affect "the land lying in the village of Valaimaid." The last words are most important as indicating the test applied by the learned Judges, for S. 49 cl. (*c*) uses the words "affecting any immovable property comprised therein." It is therefore no authority for the proposition as stated by the learned Judges in the later case. Moreover, there are other words used in the same paragraph that I have quoted which are a direct authority against that proposition. The words following the passage "have not been put in to enforce the lease" are "in which case they would not have been admissible as evidence as they would have been

1. (1894) I.L.R. 17 M. 456 ; 4 M.L.J. 198 (F B.).

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evidence of a transaction affecting immoveable property." This proposition establishes the exact opposite to what is contended for. It is certainly *obiter* but it shows that the Judges did not consider S. 17 of the Act of 1877, which is in exactly the same terms as the present Act, to apply to leases created by document only. The other cases relied on by the learned Judges in Appeal No. 201 of 1908, and here, are three cases in VII Calcutta, namely those on pages 703, 708 and 717 *i.e.*, (1) *Syed Sufdar Reza* v. *Amzad Ali*[1] *Maharaja Luchmessar Singh* v. *Mussammat Dakho* and *Maharaja Luchmissur Singh* v. *Rung Lal*[2] *Lall Jha* v. *Negroo*[3] respectively. The first was a Full Bench case which decided that an application for lease accepted by writing the word 'granted' in the margin was a lease. It does not say that if it had been accepted by a separate letter it would not have been a lease or would not have required registration. The case on page 717 decides that an unaccepted proposal is not a lease though if accepted by endorsement it is. It decides nothing else. The case on p. 708 was one in which the dowles did not contain the term for which the lands were said to have been granted and were not signed by the parties. The court held that as the dowles contained a portion only of the terms they were neither leases nor agreements for leases. This case, again, is obviously no authority for the proposition. Against the authority of this unreported case there is the language used by the Privy Council in *The Port Canning Land Investment Reclamation and Dock Co., Ltd.* v. *A. Smith*[4]. This was decided on the language of Act XX of 1866 which is slightly more favourable to the appellant, for the words of S. 17 therein are "the instruments next hereinafter mentioned." not 'the documents'. It may very fairly be said that the change of the language in the later Acts of 1877 and 1908 was to get rid of the technical meaning of the word 'instrument'. Their Lordships of the Privy Council dealing with certain letters that passed between the Port Canning Land Company and the Municipal Commissioners held that they did not amount to a lease or an agreement for a lease; and, with regard to the question of registration, use the following language: "Their Lordships think that the High Court "was perfectly right in holding that the letters did not require regis- " tration. They do not amount to a lease or an agreement for a

1. (1881) I. L. R. 7 C. 703.
2. (1881) I. L. R. 7 C. 708.
3. (1881) I. L. R. 7 C. 717.
4. (1874) 21 W. R. 315.

"lease but are evidence of a contract of a special character, not "coming within the definition found in the Registration Act." It seems to me that if the Board had thought that letters do not require registration even if they do amount to an agreement for a lease their Lordships would have said so in plain words. The question was considered by a single Judge of the High Court of Calcutta in the case reported in *Boyd* v. *Kreig* [1] where certain correspondence was sought to be put in and objection was taken that it disclosed an agreement for a term of more than a year and therefore required registration. The point was elaborately argued and the learned Judge laid down the law as follows: "As to the registration a series of cases shows that where correspondence constitutes a contract leasing premises for more than a year, that correspondence must be registered, although a formal document may be contemplated." On the facts he decided that the correspondence did not require registration as it only constituted a demise for a single year. The cases on which the learned Judge relied are not mentioned. So there is only the authority of this one case. There being no difficulty in registering correspondence and there being no principle under which a contract by two letters should be excluded while a contract by one letter and an endorsement should be included, and the language of the section being wide enough to include an agreement for a lease by more than one document, I must hold that the four letters, or at all events letters A and B did require registration. In my opinion Appeal 201 of 1908 was wrongly decided and should not be followed.

The appeal should be dismissed with costs.

Ayling, J.—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir John Wallis, Chief Justice, Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar.

Ottapurakkal Thayath Suppi and others. ...	*Appellants* * (*Petitioners in C. R. P. No. 772 of 1912 on the file of the High Court.*)
v.	
Sayid Alabi Masaber *alias* Koya Kunhi Koya.	*Respondent* (*Respondent*).

Civil Procedure Code, O. 39 R. 2 (2) & (3), O. 44 R. 1 (r)—Temporary injunction—Disobedience—Order declining to arrest or attach—Appeal lies from—Appli-

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* L. P. A. No. 345 of 1914. 15th March, 1916.

1. (1890) I. L. R. 17 C. 48.

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cation to commit while suit pending—Orders passed after dismissal of suit—Legality of—Order for imprisonment—Need not be made after an order of attachment.

An appeal lies under O. 43 R. 1 (r) of the Civil Procedure Code against an order declining to order the arrest of a person for having disobeyed a temporary injunction.

Where an injunction was disobeyed and the application to commit was put in while the suit was pending, the fact that the suit was dismissed before orders were passed on the application does not affect the powers of the court to take action for the breach of the injunction.

Under O. 39 R 2. (3) the court is not bound to pass an order of imprisonment only after an order of attachment is passed.

Appeal under Cl. 15 of Letters Patent against the judgment and order of the Hon'ble Mr. Justice Oldfield in L. P. A. No. 100 of 1913 preferred against the judgment and order of the Hon'ble Mr. Justice Miller in C R. P. No. 772 of 1912* on the file of High Court, preferred against the order of the District Court of North Malabar in C. M. A. No. 10 of 1912 (M. P. No. 821 of 1911 in O. S. No. 952 of 1909 on the file of the Court of the District Munsif of Badagara.

The facts are briefly these. The Dt. Munsif granted a temporary injunction against the appellants who admittedly disobeyed it. While the suit was still pending and the injunction in force the Dt. Munsif was moved to deal with their disobedience. The Dt. Munsif expressed his grave disapproval and ordered the appellants to pay costs. The Dt. Judge on appeal imprisoned the appellants for one month. On revision Mr. Justice Miller declined to interfere. Against this order a Letters Patent appeal was preferred. Mr. Justice Oldfield and Mr. Justice Tyabji differed and in the result the appeal was dismissed. On Letters Patent Appeal.

J. L. Rosario for Appellants.

A. Sundaram for Respondents.

The Court delivered the following

The Chief Justice.

Judgments:—*The Chief Justice*:—The main question in this appeal is whether under O. 43, R. 1 (*r*) an appeal lay to the District Court from the refusal of the District Munsif to take action under O.39, R.2 (3) for an alleged breach of a temporary injunction granted under O. 39, R. 2 (2). It is quite clear that an appeal lay in a similar case under S. 94 of Act VIII of 1859, and also under S. 588 (24) of the Code of 1882, which corresponds to O. 43 R. 1 (*r*); and that such appeals lay not only from orders in exercise of the powers conferred by the section but also from orders refusing to exercise such powers. It is also clear that refusal by the Court to take action on the breach of an injunction might seriously prejudice the party in whose favour the injunction had been granted, and it is said to be unlikely that the Legislature in-

* (1914) 26 M. L. J. 37.

Ottapurakkal Thayath Suppi v. Sayid Alabi Masaber Koya Kunhi Koya.

The Chief Justice.

intended to affect such right of appeal when it recast the language of S. 493 of the old Code when re-enacting it in the present Code. The alteration is that, whereas in S. 493 it was provided generally that in case of disobedience the injunction might be enforced by imprisonment or attachment, it is provided in O. 39 Rule 2 (3) that "the Court granting the injunction" may order the attachment or imprisonment; and it is said that these words constitute a prescribed limitation under S. 107 of the power which the Appellate Court would otherwise have under that section to pass the order which might have been passed by the Court of First Instance. In support of this contention attention was called to S. 104 (*b*) which provides for an appeal from an order under any of the provisions of the code imposing fine or detention otherwise than in the execution of a decree and to the provision in S. 104 (2) that no appeal shall lie from any order passed in appeal under this section which by virtue of sub-S. (1) (*b*) includes orders made on appeal under O. 43 (1) (*r*); and it was suggested that the alteration in O. 39 R. 2 (3) was introduced to prevent an order of imprisonment being made by the Appellate Court from which there is no further appeal under the section. If however this was the object of the alteration, it goes further than was necessary, as the rule would equally prohibit appeals from a refusal to order attachment. Further, if it had been desired to restrict the right of appeal from orders under O. 39 R. 2 in this way, nothing would have been easier than to say so expressly in O. 43 (1) (*r*) which is the provision dealing with appeals from orders under the rule in question instead of in O. 39 R. 2 which deals with original orders. It is not in my opinion permissible to read the words "the court granting the injunction" as restricting the right of appeal, unless they would otherwise have no effect, whereas they may have the effect of preventing original applications in respect of breaches of injunction being made to any other Court than that which granted the injunction, as for instance in the case of the injunction having been granted by the original court and the breach having occurred after an appeal had been perferred or possibly after the case had been transferred.

As regards the other points taken, whereas here the injunction was disobeyed and the application to commit was put in while the suit was pending, but the order was made after the suit was dismissed, that does not in my opinion affect the powers

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of the court to take action for the breach. Lastly there is in my opinion no foundation for the contention that the court can only make an order of imprisonment after an order of attachment.

I am therefore of opinion that the appeal lay to the District Judge and that he had jurisdiction to pass the order. Mr. Justice Miller has refused to revise that order and I am not prepared in this case to interfere in appeal with the exercise of his discretion. In the result the appeal is dismissed with costs.

Abdur Rahim, J. :—I agree.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J:—Three points are raised by Mr. Rosario in this appeal (1) that no appeal lies from the order of the District Munsif declining to order arrest or attachment of property for desobedience of an interlocutory injunction (2). That when the Appellate Court interfered, the injunction had ceased to exist by reason of the dismissal of the suit in the First Court. (3). That the Court had no right to order arrest and imprisonment without first ordering attachment of property.

General jurisdiction to make interlocutory orders pending suits is conferred by section 94 of the Code. Detailed provision for the exercise of such jurisdiction is to be found in Orders 38, 39 and 40. O. 39 relates to interlocutory injunctions. General jurisdiction to entertain appeals from orders is conferred by S. 104 of the code. O. 43, R. 1 makes provision for appeals from orders made under rules as provided for in clause (i) of S. 104. Under clause (r) of R. 1 of O. 43, an appeal is allowed from an order under R. 2. The injunction in the present case was granted under O. 39, R. 2. by the District Munsif. The application for arrest and attachment was also made under clause (3) of R. 2 to the court which granted the injunction (*i.e.*, the Munsif). The order in question passed by the Munsif declining to order arrest or attachment under clause (3) of Rule 2 is obviously an order under Rule 2 and would therefore be appealable. But it was argued that the introduction of the words "the court which granted the injunction" in clause (3) of Rule 2 showed that an order under that clause can only be passed by the court which granted the injunction and no other court even in appeal can do so. This construction ignores the fundamental rule that an Appellate Court only passes the order which the First Court should have passed. In many cases applications are made and in all cases suits filed in trial courts, whose duty it is to pass orders or make decrees, and in appeals, where the Appellate Courts interfere, they only pass such orders as the First

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Court should have passed. (S. 107 C. P. C.). The introduction of the words "the court which granted the injunction" in the new Code, words which are not to be found in the corresponding S. 493 of the old Code, is merely due to the change in the method of drafting. It is to be observed that the words "may be enforced" found in S. 493 have been omitted in the corresponding rule and the omission has necessitated the re-drafting of the rule in the form in which it stands. An order for attachment of the property or imprisonment of the person of a party guilty of disobedience of an injunction is not strictly speaking *enforcing the order of injunction.* It is really a punishment for past disobedience. That was probably the reason for the omission of the words. Full scope can be given to the words 'Court granting the injunction' by construing them as applicable to the original petition. For example if an injunction is granted by an Appellate Court, pending an appeal from a decree, the application to enforce that injunction in the case of breach, could be made only to the Appellate Court; for in that case the trial court before whom no action is pending would not be in a position to entertain an application. That must be the result even under the old Code. It is clear that disobedience of an order of injunction passed in appeal could not be punished by the Court which tried the suit as S. 36 or 37 corresponding to S. 649 of the old Code does not apply. Where the business of one court is transferred to another, the court to which the business is so transferred, may, I think, under S. 150 entertain an original application for attachment or arrest under clause (3) of R. 2 of O. 39. Attention was drawn to S. 104 which provides an appeal in cases of *fine and imprisonment.* That provision was made in the body of the code in analogy to the Judicature Act of 1894 which allows an appeal without leave in all cases, where the liberty of the subject is concerned, to prevent the right being taken away by rules passed by superior courts by virtue of their rule making power. In the absence of such a provision in the body of the code it would be possible for the High Courts after consulting the rule committees, to abolish the right of appeal in the cases provided for by O. 43 R. 1 including orders under O. 38 R. 4 and O. 39 R. 2 clause (3). The argument of Mr. Rozario if correct leads to this result. That an order passed by the First Court for attachment of the property and its sale is not appealable as also orders declining to commit or to attach property. In England it is now settled that an appeal lies in cases where the

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First Court declines to order committal or sequestration of property, See *Jarmain* v. *Chatterton* [1] though of course the Appellate Court would not ordinarily interfere with the discretion exercised by the First Court.

The view which I have set forth above is fully supported by a passage in High on Injunctions S. 1431 where the learned author says "An appeal from a final injunction does not suspend its operation and the doing of the act enjoined may be punished as a contempt, notwithstanding such appeal. And an appeal from an injunctional order does not deprive the court granting the writ of the right to punish for contempt for its violation, and the Lower Court and not the revising court is the proper tribunal to entertain such proceeding where the Court of Appeals of the State has jurisdiction to grant a supersede as to an order of an inferior court dissolving an injunction, and defendants after the granting of such supersede as, proceed to the commission of the act forbidden by the injunction, such action is a contempt of the Court of appeals and may be punished upon proceedings in that Court."

As regards the second question, the breach of the injunction occurred when the injunction was in force, and also when the application was made. The dissolution of the injunction owing to the dismissal of the action which happened long after the application could in no way excuse the party who had already disobeyed it. See *Eastern Trust Co.* v. *McKenzie Mann and Co. Ltd.* [2].

As to the third point I think in spite of the difference in the language the meaning is the same. The court can in its discretion order either arrest or attachment of property and is not bound in the first instance to attach and then only order imprisonment. Mr. Rosario's argument leads to this result:—That the court has power to order attachment alone or attachment and imprisonment alone. It is to be observed that the contention is not, that it is only if the attachment proves infructuous, in compelling future obedience, the writ of committal is to be issued. In England the usual order in cases of disobedience of an injunction by natural persons is attachment of the person or committal while sequestration is the usual order passed in cases of disobedience by corporations. (See Oswald on Contempt, page 223). The former practice seems to have been that unless there was a previous issue *of a writ of attachment* sequestration will not issue, but now attachment and sequestration may issue concurrently. I therefore agree in the order proposed.

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1. (1882) L. R. 20. Ch. D. 493. 2. (1915) A. C. 750.

PRIVY COUNCIL.

Present :—Viscount Haldane, Lord Parmoor, Lord Wrenbury and Mr. Ameer Ali.

[On Appeal from the High Court at Calcutta.]

Srimati Nrityamoni Dassi and others ... *Appellants**

v.

Lakhon Chunder Sen and others ... *Respondents.*

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Srimati Nrityamoni Dassi *v.* Lakhon Chunder Sen

Limitation Act, S. 14—Pendency of former suit—Relief not granted because present plaintiffs were defendants—Time taken by prior proceedings deducted—Benami—Test—Source of consideration.

In a suit by the descendants of one Gurucharan Sen by one of his sons for their share in certain properties which they alleged belonged to him but were collusively declared by their uncles with a view to protect them from their creditors, in what was styled "a deed of covenant" to belong to their mother, the wife of Gurucharan Sen and were subsequently assigned on trust by her to some only of her descendants to the exclusion of the rest, the descendants of G by another of his sons prayed that their shares also might be determined and assigned to them in the same suit and their claim was accordingly decreed by the First Court but on appeal, that decree was cancelled on the technical ground that as they were only defendants in the case, no decree could be passed in their favour and their right, could be determined only by a separate suit. On their so doing, they were met by the plea of limitation more than 12 years having elapsed from the deed of the covenant and the deed of trust.

Held, that the " deed of covenant " in no way altered the title of the parties as it did not purport to transfer any right but only contained an admission of a right which did not exist, that time began to run after the execution of the deed of trust when the trustees began to collect the rents to the exclusion of their co-heirs but that the time taken by the previous litigation when they were *bona fide* litigating for their rights should be deducted.

Their Lordships regretted that in the previous litigation the Appellate Court did not exercise the powers which they possessed under the Code of Civil Procedure to transpose them from the category of defendants to that of plaintiffs and to maintain the decree of the Court of the first Instance.

Where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the real test is the source whence the consideration came but where owing to distance of time evidence is not forthcoming on either side to establish or rebut conclusively the allegation, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts.

In this case, where one of the properties concerned was the family dwelling house and the properties were repurchased in the name of the wife and there was no evidence that the wife had any money of her own while the husband though an insolvent had money and there was also motive for purchase *benami* in the name of the wife, without discussing how far these circumstances standing by themselves would have been sufficient to outweigh the ostensible title.

Held: that from these circumstances taken along with the proved fact that the

* 31st January 1916.

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of the properties was treated exactly like the income of other admitted family properties being entered in the family accounts and applied towards the expenses of the family the inference was irresistible that the property was acquired *benami* in the name of the wife and that inference was not rebutted by the fact that she executed mortgages or that she purported to dispose of the properties by will both of these circumstances being explicable on the basis that the properties were family properties

Consolidated appeals from two Judgments and Decrees of the High Court dated 25th January 1909 and 11th December 1908 reversing a Judgment and Decree of the High Court in its original civil jurisdiction dated 15th June 1908 and confirming a Judgment and Decree of the Subordinate Judge of 24-Pergunas dated 29th December 1906 respectively.

The facts of the case are sufficiently set forth in their Lordships' Judgment.

De Gruyther K. C. and *Ross K. C.* for the Appellants.

The suit was barred by Limitation. The deeds executed in 1891 and 1892 were not *benami* and fictitious transactions and constituted a family arrangement binding on parties thereto and their representatives. The respondents were estopped from disputing the validity of those deeds. The properties were bought by Shyama Charan and given to Surat Kumari in 1861. No suit in the circumstances of the case could be brought in order to disturb a family arrangement acted upon by all the members of the family especially in the absence of the other members of the family.

Reference was made to *Dharaini Kant Lahiri* v. *Kristo K. Chowdhri* [1].

Sir W. Garth and *Spence* for the Respondents.

The decision of the High Court in the former suit has never been appealed from and is binding upon all the parties to the present appeal. The High Court per *in curiam* and in ignorance that there was an issue in respect of respondent's rights on technical grounds of procedure deprived them of the relief given by the First Court. The decision appealed against affirms the decision of the High Court in the former action which itself affirmed the decision of the Court below on the facts, issues, evidence and parties in each action being the same and there is

1. (1886) L. R. 13 I. A. 70.

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no substantial point of law raised by the appeal. The deeds in question were not intended to operate as conveyances or to form a family arrangement, but merely to conceal the true ownership of the property from creditors. There was no question of estoppel by virtue of recital in the deeds since all parties were aware at the time of their falsity and because there was no mutuality in the said deeds and no change of position there was in fact. Besides the deeds were executed to affect third parties and not the parties to it. The transaction was a *benami* one and any purchase in the name of one member of a family must be for the whole family unless the contrary is proved. There was no question of limitation in the present appeal. *Ranee Surnamoye* v. *Soshee M. Burmania* [1], *Prannath Chowdhri* v. *Rokea Begum* [2], *Pulteney* v. *Warren* [3], *E. I. Co.* v. *Campion* [4].

De Gruyther in reply.

The judgment of their Lordships was delivered by

Mr. Ameer Ali:—The two suits which have given rise to the present appeals were instituted, one in November 1904 in the High Court of Calcutta, in its ordinary original civil jurisdiction, the other in the Court of the Subordinate Judge of the district of 24-Pegunnahs, in Bengal.

The parties to this protracted litigation, with the exception of the appellant Nrityamoni Dassi and the other female defendants, are the descendants of one Guru Charan Sen, a Hindu inhabitant of Calcutta, who died in the year 1872, leaving him surviving three sons named respectively Baney Madhub Sen, Money Madhub Sen, and Chuni Lal Sen, and a widow, Surat Kumari Dassi. The appellant is the widow of Baney Madhub who died in 1897. The following genealogical table will explain the relationship in which the parties stand to one another:—

1. (1868) 12 M. I. A. 244. 2. (1859) 7 M. I. A. 357.
3. (1801) 6 Vesey, 92.
4. (1837) 6 Bligh, 187 H. L; and (1866) 11 M. I. A. 28, 43.

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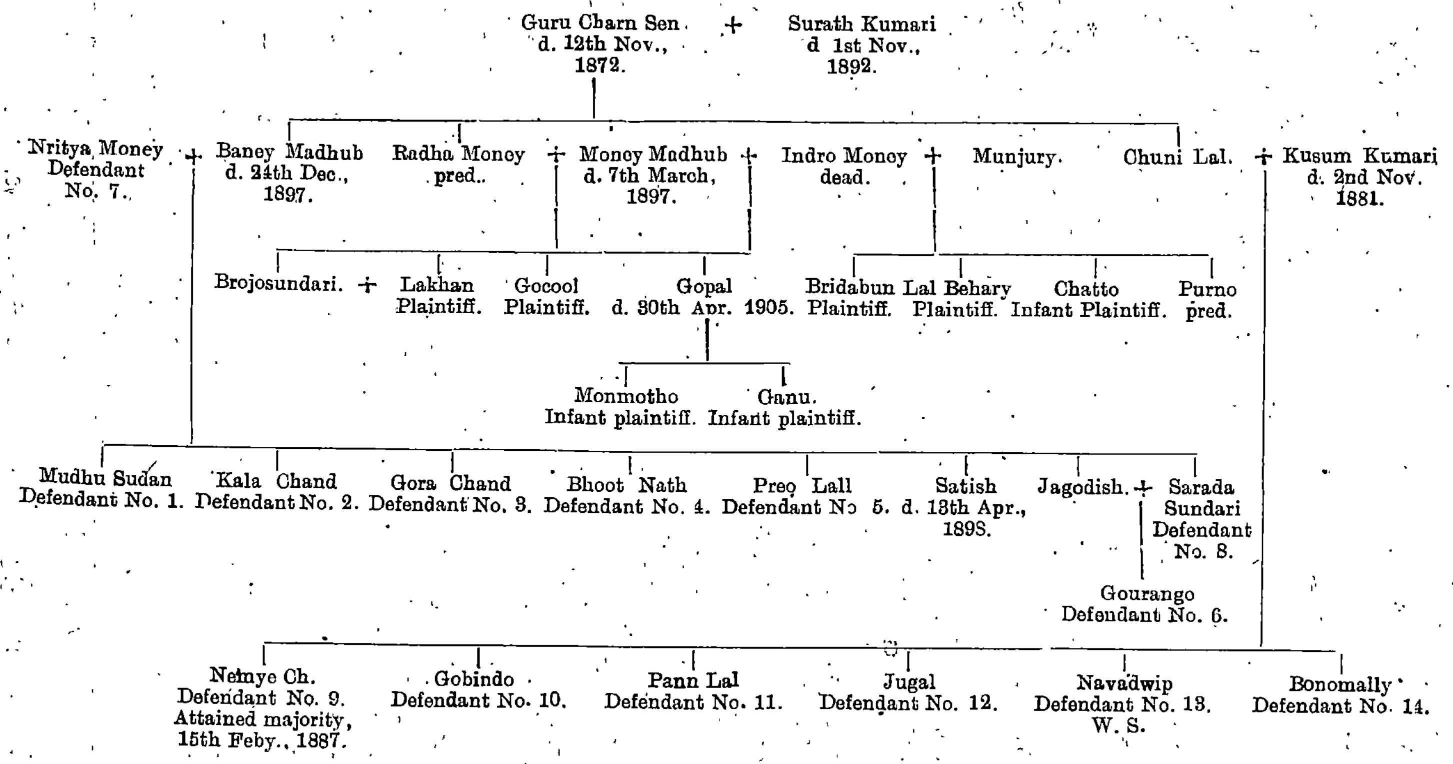

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Guru Charan Sen appears to have been at one period of his life a very wealthy man, and was possessed of considerable house property in Calcutta, besides some land in the village of Panihati in the District of Nuddea. Among the house property were eight houses situated in Banstollah Street and its vicinity, which, for the sake of brevity, may be conveniently referred to in this judgment as "the eight houses." Besides these and several others which need not be specifically mentioned, he owned 102, Cotton Street and 27, Burtollah Street.

Between 1855 and 1857 Guru Charan Sen became heavily involved in debt, one of his principal creditors being James Church, junr., and Co., to whom he had apparently been a *banian*. Early in 1857 he appears to have executed in their favour a bond by which he hypothecated, among other property "the eight houses," subject to certain prior encumbrances created in favour of one Shamo Charan Mullick, to whom also he was heavily in debt; and in a suit brought immediately thereafter on the bond he confessed judgment. Thereupon, on the application of another creditor, Guru Charan Sen was adjudicated an insolvent and all his property vested in the Official Assignee. This was followed by a suit at the instance of Shama Charan Mullick in respect of his debt. The Official Assignee then brought his action to get the insolvent's properties into his hands. All three suits were referred to arbitration, and under the award made in those proceedings Shama Charan Mullick obtained priority. The Official Assignee, in accordance with the directions contained in the Award, sold most of the houses belonging to the insolvent, inclusive of 102, Cotton Street and 27, (now numbered 34,) Burtollah Street. But for some unexplained reason "the eight houses" never came into the possession of the Official Assignee; and, although the Award contained a direction to that effect, it is now admitted they were never brought to sale. These eight houses unquestionably belonged to Guru Charan Sen, subject it is said, to certain payments out of the rents and issues for the maintenance of two idols, and he appears to have retained possession of them until his death in November 1872, when his three sons succeeded to the same. No application, however, for the substitution in the Collector's Register of their names as owners in place of their father was made until 1877, when they were recorded as *shebaits*, the ordinary designation

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for a person holding property dedicated for, or charged with, the maintenance in any way of Hindu religious worship. But it is not disputed that the income arising from the eight houses—save as to a small portion which was spent for keeping up the two family idols—was applied towards the general expenses of the joint family.

Chuni Lal, the third son, died in 1881, leaving a widow, named Kusum Kumari Dassi, and several sons, of whom Nemye Charan is the eldest. But his death made no difference in the mode of dealing with the income of the eight houses or in the general condition of the family, which was that of an ordinary Hindu joint family, of which Baney Madhub, the eldest male member, was the *karta*.

This state of things continued until 1891, when the events took place which gave rise to the litigation of 1896 and also form the subject of the present dispute.

As already stated, 102, Cotton Street, and 27, Burtollah Street also belonged to Guru Charan Sen. These were put up to sale by the Official Assignee. One was purchased by Shama Charan Mullick, the other by one Heera Lal Seal for Shama Charan Mullick, and to whom Heera Lal appears to have afterwards transferred it by deed. Why this devious course was adopted in respect of these houses is a matter of inference. Shama Charan Mullick is also stated to have bought up the claims of most of the other creditors. In 1861 he conveyed 102, Cotton Street, and 27, Burtollah Street, to Surat Kumari Dassi, the wife of Guru Charan Sen; and one of the main questions in the present litigation is whether she took them as absolute owner or merely *benami* for her husband and the joint family, of which he was the *karta* and the head.

Between 1888 and 1890 the two brothers Baney Madhub and Money Madhub found themselves heavily involved in debt: their *banianship* business had brought them no profit; Money Madhub had already suffered imprisonment for debt, and evidently the creditors were pressing their demands. To add to these difficulties, differences and disputes had commenced in the family chiefly owing to the indebtedness of the two brothers; whilst the mother, Surat Kumari Dassi, in whose name, either as absolute owner or in trust for the family, some of the properties stood, was getting very old. The sons of Guru Charan Sen had

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before them the fate of their father, who, though he had no doubt contrived to save some part of his possessions from the general wreck of his fortunes, had died an undischarged bankrupt. It is easy in these circumstances to imagine why it was considered advisable by the principal adult members to devise some method to shelter the family properties remaining in their hands from their creditors. It is not clear whether Baney Madhub was the prime mover in evolving the scheme, as was alleged afterwards by Money Madhub, but both took an equal part in carrying it out. This was indubitably, it might be said admittedly, the motive cause for the execution of the documents, with the nature and effect of which their Lordships have to deal in these two appeals.

Early in 1891 a solicitor of the name of Netye Dass Dey was instructed to draw up certain deeds by which Baney Madhub, Money Madhub, and the representatives of Chuni Lall were to transfer absolutely the "eight houses" to Surat Kumari Dassi, who on her side, in consideration thereof, was to convey in three separate parcels the houses which stood in her name. 102, Cotton Street, the large family residence of Guru Charan Sen, had by this time become divided into three separate premises bearing separate municipal numbers—115, 116 and 117, Cotton Street—the first being occupied as the joint family dwelling-house. Another house, No. 111, had been acquired, in the name of Surat Kumari Dassi, and was added wholly or partly to the *boitak-khana*, or male reception room, of No. 115.

To resume the narrative of events leading to the litigation in which the family has been involved since 1896, Netye Dass Dey carried out his instructions and drafted the required deeds. Evidently these were not considered sufficient to answer the object in view, and another well-known solicitor of the Calcutta High Court, named Mr. Nemye Charan Bose, was consulted on the subject, and he appears to have been of opinion that the projected transfer of the "eight houses" to Surat Kumari could not be sustained against the claims of the creditors. He accordingly prepared another deed, which was approved, and on the 30th June, 1891, Baney Madhub and Money Madhub executed this document, called by the parties in these proceedings "the deed of covenant," by which they disclaimed all right to and interest in the eight houses, and acknowledged that their mother,

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Surat Kumari Dassi, was the real owner, and that they had been realising the rents of this property on her behalf. They further stated that, as she was desirous of taking over its charge herself, and in consideration of her not demanding an account from them of their stewardship, they were making this declaration in her favour. Nemye Charan Sen, the eldest son of Chuni Lall, who was *sui juris* at the time, did not join in the deed, though he witnessed it. There is no suggestion of any kind in this document that the "eight houses" were *debuttur*.

On the same day, *viz.*, the 30th June, 1891, they executed another document, by which they substituted their mother as trustee in their stead in respect of a Government of India promissory note for a sum of 5,000 rupees held by the Official Trustee, and of certain lands in the village of Agarpara which had vested in them under a trust deed executed by their grandmother, Surjumoney Dassi, the mother of Surat Kumari.

By the same deed they assigned or purported to assign to her the sole management of the ancestral lands at Panihati, over part of which their grandfather, Bissumber Sen, the father of Guru Charan, had erected a dwelling-house and a *thakoorbari* (temple), where he had placed two family idols. This property was held by Guru Charan during his life, and on his death had devolved on his sons. In the document under reference it was recited that the management of the temple and of the worship was conducted by them until then in conjunction with their mother.

Contemporaneously with these two deeds, Surat Kumari executed three separate "deeds of gift"; by one she gave to Nrityamoni Dassi, the wife of Baney Madhub, in trust for herself and her sons, 116, Cotton Street; by the other, 117, Cotton Street and 34, Burtollah Street to Kusum Kumari Dassi, the widow of Chuni Lall, and "her sons and grandsons" in succession; and by the third, No. 111, Cotton Street to Baney Madhub.

On the 27th July, 1891, she executed in favour of Munjuri Dassi the wife of Money Madhub, of his two sons by a predeceased wife, and of Brajo Sundari Dassi, the wife of his eldest son, Lakhan Chander Sen, a deed of gift in respect of 115, Cotton Street.

She thus allotted to the three branches of the family the property which under the transfer by Shama Charan Mullick

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stood in her name, and to which, according to the appellant's case, she was absolutely entitled. The reason why the gifts were made to the female members of the three branches is obvious. The object plainly was to avoid the possibility of the houses in question being attached and sold at the instance of creditors of Guru Charan's sons.

It is to be observed that parts of all three houses appear to have been let out to tenants, and that although No. 115 was alloted to Money Madhub's branch, Baney Madhub's family with Surat Kumari, continued to reside there for some time at least, though in 1892 Nrityamoni herself, with her mother-in-law, Surat Kumari, appears to have moved to Panihati.

On the 18th January, 1892, Surat Kumari executed a deed of trust, by which she dedicated the "eight houses" to the worship of certain idols named therein, and appointed Baney Madhub, his wife Nrityamoni, and Saroda Sundari Dassi, the widow of one of his sons then deceased, as trustees of the endowment she purported to create by this document. From this time, it is clear, Baney Madhub began to collect the rents and issues of the "eight houses" to the exclusion of the other two branches. The rent receipts are headed "Estate of Surat Kumari Dassi," and are signed by him for himself and his co-trustees. Bitter disputes naturally sprang up in the family, which finally led to the institution of a suit in the High Court of Calcutta in its original civil jurisdiction on the 21st of December, 1896, by the sons of Chuni Lal other than Nemye Charan Sen against Baney Madhub, Money Madhub, Nrityamoni Dassi and Saroda Sundari Dassi. As Nemye had attested the "deed of covenant" he was joined as a defendant. Their mother, Kusum Kumari, was made a party after the action was launched.

The plaintiffs charged that the statements in the "deed of covenant" of 1891 were wholly false; that Surat Kumari had no title or interest whatsoever in the properties to which it related; that it was concocted with the object of sheltering the "eight houses" from the creditors of Baney Madhub and Money Madhub; that Surat Kumari had no right to dedicate the said houses; and that the "deed of covenant," together with the deed of trust of the 18th January, 1892, were wholly inoperative against them and did not affect their rights in the properties in question. And they asked that their share and the share of their

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brother, Nemye Charan, may be ascertained, and the "nature and extent of their right may be declared."

Money Madhub did not enter any defence, but in an affidavit relating to the discovery of documents in his possession, made on the 1st May, 1897, he alleged that he had executed the "deed of covenant" under the undue influence of Baney Madhub and Surat Kumari Dassi, both of whom had assured him that, under the arrangement, all the sons and representatives of Guru Charan Sen would remain in possession of the "eight houses," and that he had no intention of defrauding his creditors, or depriving the sons of Chuni Lall of their rights in the said properties.

Money Madhub died during the pendency of the suit, and his sons were substituted in his place, and Munjury Dassi was brought on the record as the mother and representative of her son Poorno, who had died after Money Madhub.

The sons of Money Madhub, whilst repudiating the charges made against their father, associated themselves with the claim made by the plaintiffs in that suit, and asked that their rights and interests might also be declared in those proceedings. The contesting defendants, Baney Madhub, Nrityamoni and Saroda Sundari filed a joint written statement in which they traversed the main allegations of the plaintiffs regarding the object with which the documents referred to were executed in 1891. With respect to the property in dispute, they admitted that it belonged originally to Guru Charan Sen, but they alleged that it was assigned by him to James Church, junr., and Co. in satisfaction of their claim, and that Shama Charan Mullick purchased the same from them with monies belonging to and paid to him by Surat Kumari Dassi, that Shama Charan Mullick also bought at the Official Assignee's sale, 102, Cotton Street and 27, Burtollah Street, and subsequently transferred all the houses to Surat Kumari, who held them ever since in her own right as absolute owner, consideration for the transfer, in this instance also, being paid by her with her own money.

Baney Madhub died before trial, and his sons were brought on the record as his heirs and representatives. Some of them filed separate written statements in which the allegation about the purchase of the "eight houses" is put somewhat differently, but the variation does not affect the real defence, *viz.* that the

houses were the absolute property of Surat Kumari, acquired with her own money.

The suit came for trial before Mr. Justice Henderson, of the Calcutta High Court, who, after an exhaustive examination of the evidence, held in substance that the "eight houses" never belonged to the mother; that they all along remained the property of Guru Charan Sen, and devolved, on his death, on his three sons; that the "deed of covenant" executed in 1891 was merely with the object of sheltering the "eight houses" from their creditors; and that neither that document nor the deed of trust of the 18th January, 1892, affected the rights and interests of the plaintiffs or of the representatives of Money Madhub. He accordingly decreed the claims of the plaintiffs in that suit. He made a similar decree in favour of the sons of Money Madhub.

On appeal, the High Court in its appellate jurisdiction, affirmed the findings of Henderson J., so far as the "eight houses" were concerned, and affirmed his decree in favour of the plaintiffs in that suit, *viz.* the sons of Chuni Lall, other than Nemye Churn, but differed from him in the opinion he had incidentally expressed regarding the right of Surat Kumari in 102, Cotton Street and 27, Burtollah Street, which was not directly in issue in that case. With regard to the claim of Money Madhub's sons, the learned Judges considered that as they were defendants Mr. Justice Henderson's decree in their favour could not be maintained. They accordingly varied his decree in that respect, and relegated them to a fresh suit for the relief to which they were clearly entitled. It was unfortunate that the learned Judges did not exercise the power which they possessed under the Code of Civil Procedure, to transpose the sons of Money Madhub from the category of defendants to that of plaintiffs, and to maintain Mr. Justice Henderson's decree in their favour. Had they done so they would have spared this family another ten years' litigation. The mistake was purely technical and could have been set right by a small amendment without the parties resorting to a fresh suit.

The appellate decree was made on the 22nd February, 1904, and on the 14th November of the same year Lakhan Chunder Sen and his brothers, the sons of Money Madhub, brought the present suit, 826 of 1904, in the High Court of Calcutta, in its ordinary original civil jurisdiction, for the assertion of their rights

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to a one-third share in the "eight houses" which had devolved on their father on the death of Guru Charan.

The allegations and charges in the plaint are, like the defence, substantially the same as in the previous suit. The appellant Nrityamoni Dassi, who was the real contesting defendant, raised a further plea that the suit was barred under the Statute of Limitation.

The case was heard in the first instance by Bodilly J., who upheld the defendants' objection, and dismissed the suit. On appeal, the High Court reversed his decree, and remitted the cause for trial on the merits with the following remarks:—

"The appeal must be allowed with costs both here and in the Court below, "and the case must be remitted to be tried out on the merits if, after the contest "which took place in the previous suit, the present respondents think that there "are still any merits to be discussed.".

The case then came before Chitty J., who, in face of the judgment of the Appellate Court on the question of limitation, held that the plaintiffs' suit was "out of time," as Surat Kumari's possession was adverse to their father, Money Madhub, from the 30th June, 1891. He also held that they had failed to prove "the *benami* character of the declaration of trust." He accordingly dismissed the suit.

On appeal the decision of Chitty J, was set aside, and the plaintiff' claim was decreed with costs. The present appeal before this Board is by Nrityamony Dassi, who claims to hold the property under the trust deed executed by Surat Kumari on the 18th January, 1892; and the plea in bar of the suit is again urged on her behalf.

As their Lordships concur generally with the reasons given by the Appellate Court for overruling the plea of limitation, they do not wish to prolong the present judgment by dealing with the question at any length. They desire, however, to observe that if the property belonged in fact to Surat Kumari, and was held by her all along in her own right, as has been the defendant's contention throughout the various stages of this long drawn litigation in India, obviously no question of limitation arises; neither their father nor the plaintiffs had or have any title to it, and their suit must fail on that ground.

If, however, the "eight houses" never belonged to Surat Kumari, as is now conceded at their Lordships' Bar, if they always remained the property of Guru Charan Sen and devolved on

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his sons by right of inheritance, then the declarations made by them in the "deed of covenant," which are now admitted to be wholly false, in no way altered the title. It did not purport to transfer any right: it was only an admission of a right which did not exist. There is no allegation, far less any evidence, that Surat Kumari pretended to exercise any right under that document adversely to the real owners until January 1892. It was after the execution of the trust deed of 1892 that Baney Madhub, purporting to act as one of the trustees, began to collect the rents and issues of the eight houses to the exclusion of the other co-sharers. Limitation would no doubt run against them from that time. But it would equally without doubt remain in suspense whilst the plaintiffs were *bona fide* litigating for their rights in a Court of Justice. They had in the suit of 1896 before Mr. Justice Henderson associated themselves with the plaintiffs in that action, and had asked for an adjudication in those proceedings of their rights. A distinct issue was framed in respect of their claim, to which no objection seems to have been made by the appellant Nrityamoni; and the learned Judge who decided the case pronounced, with reference to their prayer, the following order:—

"The defendants, the representatives of Money Madhub, will be declared "jointly entitled to a one-third share in the scheduled properties, and the Official "Referee will make similar enquiries with regard to their share and the share of "Nemye Charan Sen, as to mesne profits and the deeds, assurances, and other "things which may be necessary. These defendants will be entitled to get posses-"sion of the shares to which they have been declared entitled."

It was an effective decree made by a competent court, and was capable of being enforced until set aside. Admittedly, if the period during which the plaintiffs were litigating for their rights is deducted, their present suit is in time. Their Lordships are of opinion that the plea of limitation was rightly overruled by the High Court.

As regards the nature and effect of the deed of covenant of the 30th June, 1891, their Lordships have no hesitation in holding, in concurrence with the High Court, that it was wholly illusory; that it never operated to transfer any rights, nor in fact was it intended to do so; and that it was a mere device for deceiving the creditors of Baney Madhub and Money Madhub, and sheltering the property under their mother's name by making an acknowledgment of a right which never existed. All the facts

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and circumstances taken in conjunction with the statements in the document itself contradict the suggestion that it was part of a *bona fide* family arrangement.

Their Lordships are of opinion that the decree of the High Court in Suit 826 of 1904 is right, and should be affirmed.

Their Lordships have kept quite separate the question relating to the right to 102, Cotton Street, and 27, Burtollah Street, which is involved in the suit of Madhusudan Sen, brought in the Court of the Subordinate Judge of the 24-Pergunnahs. It arose only incidentally in the litigation of 1896, and in suit 826 of 1904, mainly in consequence of the endeavour on the part of the defendants to confuse the issues by placing the "eight houses" in the same category as the other houses as property acquired by Surat Kumari Dassi with her own money from a Shama Charan Mullick.

Madhu Sudan is a son of Baney Madhub, and he brings this suit for a declaration of his right as one of Baney Madhub's sons to a one-seventh share of 116, Cotton Street, and in the Panihati lands and 111, Cotton Street, and in respect of the *shebaitship* of the Agarpara property. He alleges that the deeds of gift executed by Surat Kumari only gave effect to a family partition under which his father received 116, Cotton Street as his share in the Cotton Street property, and that the transfer to Nrityamoni was wholly nominal.

The Subordinate Judge dismissed his claim with respect to 111, Cotton Street, holding that that property was sold by Baney Madhub *bona fide* for the satisfaction of the debts of the joint family, for which purpose it was, in fact, transferred to him by Surat Kumari, in whose name it stood. He also held, in substance, that the transfer of 102, Cotton Street, and 27, Burtollah Street, by Shama Charan Mullick to Surat Kumari was really for the benefit of Guru Charan Sen, that she had no beneficial interest in the same, and that the allotments made in 1891 by the several deeds of gift as well as the document of the 18th January, 1892, were executed "with the object of dividing the properties of the three brothers in such a way that their creditors might not seize them in satisfaction of their claims," and that Baney Madhub took 116, Cotton Street, in the name of his wife. He accordingly decreed the plaintiffs' claim with reference to that property, the Panihati lands and the *shebaitship*, and his

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decree has been, with a slight modification, affirmed on appeal by the High Court of Calcutta.

Nrityamoni has appealed, and the sole question for determination now left in this case is whether the two houses were conveyed to Surat Kumari by Shama Charan Mullick in her own right as beneficial owner, or, to use the Indian technical expression, *benami* for Guru Charan Sen and the joint family. Their Lordships have repeatedly laid down that in cases where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the real test is the source whence the consideration came. At this distance of time it is hardly likely that evidence would be forthcoming on either side to establish or rebut conclusively the allegation. The case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts. On the plaintiffs' side it is contended that 132, Cotton Street was the family dwelling-house, and that Guru Charan had the strongest possible motive to try to preserve it for the family. The Subordinate Judge finds as a fact, a view which is affirmed by the High Court, that he had means, in spite of his insolvency, to buy it back. From this conclusion on the evidence as it stands their Lordships find it difficult to dissent.

On the defendents' side, it was urged in the written statements that Surat Kumari had bought these two houses, equally with the "eight houses," with her own money. There was absolutely no evidence in support of this allegation; no books of accounts showing payments, and no vouchers or receipts have been produced, nor is there any suggestion that any such ever existed and were now lost. At a later stage of the case, the difficulties which surrounded the defendant's allegation were perceived, and it was then suggested that the conveyance by Shama Charan was a voluntary gift to Surat Kumari, who was a connection of his. If it was a gift, it might, as is contended on behalf of the plaintiffs, as reasonably be a gift to the family in her name.

Guru Charan was an undischarged insolvent; a purchase by him in his own name, or a gift to him in his own name, would have been swept up by the Official Assignee for the benefit of his creditors. What more natural then, it is said, than that the conveyance should be in the name of the wife? In this connection it is to be noted that although Shama Charan

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Mullick acquired the houses in 1859, and the transfer to Surat Kumari was made in 1861, the possession all along appears to have remained as before with Guru Charan, for neither Shama Charan nor Heera Lal ever took possession of the properties.

It is unnecessary to discuss how far these probabilities and inferences, standing by themselves, would outweigh the ostensible title, for the books of accounts that were produced in the litigation of 1896 and are exhibited in the present suits, kept from 1872, coupled with the circumstances referred to above, leave little reason for doubt that the conveyance of 1859 in favour of Surat Kumari was in reality for Guru Charan Sen and his family. They show beyond any reasonable doubt that the rents and issues arising from these two houses were kept in exactly the same way as the rents of the "eight houses"; that they were entered in the books of the three brothers, for Surat Kumari had no books of her own, and were applied towards the expenses of the family. The inference is irresistible that she was not the beneficial owner of any of the houses.

The mortgages in respect of the houses in question executed by her by way of security for the *banianship* of Baney Madhub and Money Madhub respectively, do not miliate, in their Lordships' opinion, with this conclusion. As the property stood in her name, the mortgages could only be made by her. It is to be remarked, however, that in almost every instance, Guru Charan Sen was also made a party. Nor do the dispositions she purported to make by her will in 1883 affect the position. Had she died without expressing her wishes as to how the property should be allotted, it would have, in all probability, given rise to a contest. It stood in her name and was open to the contention that it was her *stridhan* to which the two surviving sons were entitled, to the exclusion of the sons of Chuni Lal who had died in her lifetime.

For these reasons their Lordships are of opinion that the judgment of the High Court is right and that both these appeals should be dismissed, and their Lordships will humbly advise His Majesty accordingly. The appellants will pay the costs of the appeals.

Solicitors for appellants:—*J. L. Wilson & Co.*

Solicitors for respondents:—*Downer & Johnson.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Sri Rajah Varadaraja Appa Rao Bahadur Zamindar Garu. *Appellant * in all*

v.

Gonepalle Punnayya (died) and others. *Respondents in A. A. O. No. 236 of 1914 Defendants.*

Sri Raja Varadaraja Appa Rao *v.* Gonepalle Punnayya

Permanent Settlement—Land comprised in—Ryoti land—Agreement by Zamindar with Government to hold on ryotwari patta—Validity of—Suits for rent —Jurisdiction:

The holder of a partible Zamindary, may validly agree with the Government to hold ryoti lands comprised in his sunnud on ryotwari tenure provided that no existing rights of any person in the land are thereby affected; and the lands then cease to form part of the permanently settled estate.

Where the holder of a partible Zamindari let ryoti lands for a term till 1904 and he then agreed with the Government to hold these lands on ryotwari tenure, a suit for rent against the tenants of those lands lies in the Civil Court; and not in the Revenue Courts.

Per Sadasiva Aiyar, J.:—The Zamindar is entitled to the full enjoyment of every parcel of the lands within the Zamindari and it is for the party who sets up the Government's right to resume and assess any portion of land lying within the limits of the Zamindary to prove it.

Appeals against the orders of the District Court of Kistna dated 10th March 1914 in A. S. No. 429 to 438 and 706 of 1913 preferred against the decrees of the court of the Additional District Munsif of Masulipatam in O. S. Nos. 245, 361 to 366, 408, 409 and 436 of 1911 and 50 of 1912.

Petitions under S. 115 of Act V of 1908 praying the High Court to revise the decrees of the court of the Temporary Subordinate Judge of Masulipatam dated 1st February 1915 in miscellaneous Appeal Nos. 44 to 48 of 1914 preferred against the decrees of the court of the District Munsif of Gudivada in O. S. Nos. 4 and 185 to 188 of 1913.

C. R. P. Nos. 676 to 680 of 1914, 49 to 54 of 1915 and 58 to 64 of 1915 :—

Petitions under S. 25 of Act IX of 1887 praying the High Court to revise the decrees of the Court of the Subordinate Judge of Bezwada in S. C. S. Nos. 409, 410, 413, 885, 1089 of 1913; 679, 680, 682 to 685 of 1913; and 91, 93 to 96, 131 and 270 of 1914.

* A. A. O. No. 236 to 246 of 1914; C. R. P. Nos. 365 to 369 of 1915; 676 to 680 of 1914; 49 to 54 of 1915 and 58 to 64 of 1915. 21st December 1915.

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L. A. Govindaragava Aiyar and *P. Nagabushanam* for Appellants.

V. Rama Doss for Respondents.

The Court delivered the following

Judgment:—*Sadasiva Aiyar, J.*:—Plaintiff is the appellant. He is the Zemindar of Gannavaram (one of the Nuzvid Zemindars). The suits out of which this appeal and the connected appeals and, certain connected revision petitions have arisen were brought by him (not as Zemindar but as a ryotwari owner of certain lands under the Government) for recovery of the arrears of the rents of the lands from his tenants. The suits were brought in the District Munsif's Court of Gudivada. The District Judge on appeal returned most of the plaints in these suits on the ground that the tenants are entitled to treat the plaint lands as situate in an "Estate" under the Madras Estates Land Act and that the suits ought to have been filed in the Revenue Court.

The principal contentions argued before us are found in the grounds 3, 4 and 11 of the memorandum of second appeal which are as follows:

3. The lands in dispute having been dealt with at the time of the Inam Commission as inam lands in which the Government possessed the reversionary interest and having been enfranchised in favour of the then holders, the Lower Appellate Court should have presumed that these lands were excluded from the Zemindari at the time of the Permanent Settlement."

4. "It being a pure question of fact, whether the full rental value of these lands was included or not in the assets of the Zemindari at the time of fixing the peishcush, the Lower Appellate Court should have addressed itself to this question of fact and decided it on the evidence or ordered a further enquiry if necessary."

11. "The Lower Appellate Court has misunderstood the legal effect of such a resumption and the regrant to the plaintiff under a *seri* patta on the rights of the defendants, assuming that they were holding the lands at the time of the resumption.

In 1859, the Inam Commissioner seems to have thought that he had jurisdiction to deal with these Ranuva Service inam lands and he issued the title deed Exhibit O and three similar title deeds to the four Inamdars.

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The first and second paragraphs of the title deed (O) are as follows :—

"On behalf of the Governor-in-Council of Madras I acknowledge your title was Zamindar's service Inam situated in the village of Chorajudi in Taluk at Gallopalli in the District of Masulipatam, claimed to be of acres of one hundred and ninety four of dry lands held *for rendering service to the Zamindar.*"

2. This Inam is confirmed to you and your successors, subject to the existing quit-rent of Rs 166—12—5 per annum to be held without interference so long as the conditions of the grant are duly fulfilled."

The 1st paragraph clearly admits that the service to be rendered was to the Zamindar. The quit-rents mentioned in the 2nd paragraph was payable to the Zamindar and not to the Government. That it is a pre-settlement inam is admitted. I cannot find anything in this title deed to indicate that the Government possessed any reversionary interest in these lands. The statement in the 3rd ground of the appeal memoranda that the lands were enfranchised in favour of the then holders is not supported by this title deed. Exhibit O can therefore only be treated as a document which *recognised* the grant in Inam of these lands which grant had been made by the Zamindar before the Permanent Settlement.

In the Privy Council case in *Secretary of State for India* v. *Kirtibas Bhupati Harichandan Mahapatra* [1], the question of the nature of Chaukidari Chakran Service under a Bengal Zamindar and the right of the Government to resume and assess the lands as Inam to the service holders were considered. At page 727 their Lordships say "the lands in dispute admittedly lie within the ambit of estates settled with the plaintiffs' ancestors." The respondents are the Zamindars and as such they have the *prima facie* title "to use the language of the Board in *Rajah Saheb Prahlad Sein* v. *Maharajah Rajendra Kishore Singh* [2] to the full enjoyment of every parcel of lands within their Zamindaris for which they pay revenue to Government. It rests on the defendant to show that when the Zamindaris were confirmed to the plaintiffs' ancestors it was subject to reservations in respect of any lands which gave Government the power of resuming and assessing it."

1. (1869) I. L. R. 42 Cal. 710. s. c. 28 M. L. J. 457.
2. (1914) 12 M. I. A. 292 and 331.

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Having regard to the nature of the service to be performed by the Inamdars in this case (namely the guarding of the Zamindars treasury and the escorting of the money remittances sent by the Zamindar to the Government treasury, I think that the learned District Judge was justified in finding on the evidence that the service was personal or private to the Zamindar and that as the burden of proving that the income therefrom was not included when fixing the Jama at the Permanent Settlement was on the plaintiff (who sets up the Government's right to resume the Inam) and as sufficient evidence has not been adduced to prove the negative proposition it must be held that the lands were not Lakhiraj lands. See *Sri Raja Parthasarathi Appa Rao Bahadur* v. *Secretary of State* [1].

It is not shown that the District Judge failed to consider any of the material evidence in the case before he arrived at his conclusions on the facts, those conclusions being, that the lands were not Lakhiraj at the time of the Permanent Settlement and that the correct inference to be drawn from the nature of the services is that the services were personal and private to the Zamindar and did not partake of a public character.

Further in the judgment Ex. P in the suits of 1897 between these same parties, the following statement appears in paragraph 26. "The service tenure held by them was created for the purpose of doing the private work of the Zamindar and the grant was not for the performance of any public service." This finding of fact seems also to be *res judicata* in the present suits. I am therefore of opinion that the contentions in the 3rd and the 4th grounds of the appeal memorandum cannot be accepted.

Coming to the 11th ground of the appeal memorandum, it is clear from what I have already stated that the right of resumption of the inam was vested in the Zemindar and not in the Government (See S. 4 of Regulation 25 of 1802 and *Sri Raja Parthasarathi Appa Rao Bahadur* v. *Secretary of State* [1]. The acts of the Government in 1903, therefore which professed to resume the lands as if they had been excluded from the Permanent Settlement are of no legal efficacy.

In the present case the Zamindar himself clearly resumed the lands when the inamdars executed the relinquishment deeds

1. (1913) I. L. R. 38 M. 620 s. c. 26 M. L. J. 39.

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(D series) between 1889 and 1895 in his favour, expressing their inability to perform the services thereafter he having accepted such relinquishment deeds, the Inam then came to an end See *Raja Kishen Datt Ram* v. *Raja Mumtaj Ali Khan* [1] and the lands became ordinary ryoti lands of the Zemindary estate. The Zamindar seems to have had for some years subsequently no clear ideas as to the legal effect of his own resumption of the lands, for he seems to have continued to call them Ranuva Navukari Inam lands and to have let them as such on temporary leases to the old inamdar's sub-lessees. The Zamindar's ideas about his rights cannot however alter the nature of the lands or his legal rights therein.

By the year 1895 then, all the lands had become ordinary ryoti lands in the Zamindari but nobody had acquired any occupancy rights therein. In fact, the Zamindar sued the Inamdar's lessees and obtained decrees in ejectment against them, ejected them in execution of such decrees and then relet the lands on temporary leases. (See Exhibits P 1, 2 and D series).

Then we get to the documents (Exhibit G series) which are of very great importance. Exhibit G is a Yadast dated 15th March 1902 sent by the Tahsildar to the Zamindar.

The material portions are as follows: "Petition No. 178 dated 3-10-01 put in by you that the Ranuva Navukari (militia service) inams in the village of Chorajudi should be specified in your name was received Pattas bearing Nos. 938, 940, 941 and 942 were granted by the Inam Commissioner for the Inam land of acres 448-15 cents mentioned in the said petition. By this it is evident that the said inams are the inams granted before the bara fasli i. e. fasli 1200) and are not subsequent inams. When the Inamdars cannot do the service and when you do not require any service you have no authority at all to get the said inams relinquished in your favour by the Inamdars. You have no such authority with respect to the inams subsequent to the bara fasli and not at all with respect to the previous inams. When the inams are Service Inams granted previous to fasli 1200, the Government only have the right to resume the said inams, and nobody else has any right." "It is therefore hoped that the reply will be sent immediately why the Government should not resume the lands mentioned in your petition."

1. (1879) I. L. R. 5 Cal. 209.

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Then on 28-5-02 a reminder G 1 was sent by the Tahsildar to the Zamindar and we are led to infer that negotiations went on between the Zamindar and the Government Revenue Officer about the Government's rights to treat the lands as ryotwari lands and to impose full assessment thereon and the Zamindar seems to have been persuaded by the Revenue authorities to admit the claims of the Government and to treat himself as a ryotwari tenant of the lands under the Government. The Collector wrote to the Board of Revenue on 1-6-1903 that the lands may be charged full assessment less the Jodi which was payable to the Zamindar. The Board of Revenue passed proceedings G. 6 on 29-7-03 accordingly. The Tahsildar finally sent the Yadast (Exhibit G 3) on 24-9-02 to the Zamindar of Gunnavaram in which he says that the Board of Revenue had resumed the lands covered by the inam title deeds 938, 940, 941 and 942 and ordered the levy of full assessment less the Jodi and that inams *will thereafter be treated as ryotwari lands.* The Zamindar evidently accepted this decision of the Board. Then Exhibit G 4 dated the 30th March 1904 says that it had been decided that the *seri* patta for the lands will be granted in the Zamindar's name. It is not denied that the Zamindar has since then treated the lands as his private ryotwari lands and has been letting them on temporary leases to the defendants and others. It seems to me clear that from about the end of 1903 by arrangement between the Zamindar and the Government the lands which till then were part of the permanently settled estate were taken out of that estate. The Government's right to impose full assessment having been accepted by the Zamindar who was the only person then interested in contesting the right of the Government to impose full assessment and the order of the Board of Revenue having become final through the Zamindar's not having sued within one year (See A. 14 of the Limitation Act) to set aside that order of the Board imposing full assessment on these lands could no longer be treated as permanently assessed. I am unable to accept the argument of Mr. Ramadoss that the area of a permanently settled estate cannot be diminished or increased even by agreement between the Zamindar and the Government, when the rights of third persons are not affected thereby.

Whether in the case of an impartible estate a diminution could be made by agreement between the then holder of the

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estate and the Government so as to affect the rights of the succeeding Zamindars after the enactment of the Impartible Estates Act need not be considered in this case as the Gunnavaram estate is admittedly a partible estate. The plaintiff in this case was the sole owner of the Zamindari including the plaint lands in 1903. He was entitled to agree to the imposition of full assessment on the plaint lands provided the then existing rights of no other person and no rights of any other such person existed then. When full assessment was imposed therefore under those circumstances these lands ceased in my opinion to form part of the permanently settled Zamindary estate. The learned District Judge says that the arrangement between the Zamindar and the Government, " might estop the Government from selling the plaint land as part of the estate should arrears of peishcush arise and that the arrangement might estop the Zamindar in any claim between him and the Government as to its nature." But he proceeds to say that this could not affect the rights of third parties, that is, the tenants who were cultivating the lands in 1903. But those tenants had no rights then which could be affected by the acts of the Zamindar and of the Government in taking away these lands out of the lands included in the Permanent Settlement, except the right to enjoy the lands under their prior leases till 1904 and that right of enjoyment was fully exercised by them till the 1st of July 1904 and was in no way affected or intended to be affected by the arrangement between the Zamindar and the Government. The learned District Judge was not justified in treating the lands as continuing to be parts of the permanently settled estate till the Estates Land Act came into force on 1-7-1908 and in their granting to the defendants who had come on as the tenants of ryotwari lands the benefit of S. 6 of the Madras Estates Land Act. In this connection I have to notice that while in the muchilikas C to C 27, C 47, C 57 and C 58 executed between the years 1893 and 1899, the lands are described as Ranuva Inam lands, in all as Ranuva Inam lands, in all the muchilikas executed after the Government and the Zamindar had agreed to treat the land as Government ryotwari lands (see Exs. C 28 to C 46, C 48 to C 56, C 59 and C 60, that is after the year 1903, the lands are described mostly as the plaintiff's savaram lands or " own" lands. No provision of any Statute Law has been pointed out (and I have not been myself able to find

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any) which prevents a Zamindar from consenting to the Government imposing ryotwari assessment on the whole or portions of his zamindari lands provided the existing rights of others in such lands are not affected thereby. Some reliance was placed by the Respondent's learned Vakil on the form of the sannad issued to Zamindars before 1870 (see the standing orders of the Revenue Board Vol. II page 153.) The second paragraph has the words. "The British Government.....has resolved......to fix for ever a moderate assessment of public revenue on such lands which shall never be liable to change under any circumstances." It is clear that the first two paragraphs of this sanad are not the operative part thereof. The second paragraph at the end says that the Government have resolved to secure the free ex rcise of the religious institutions and domestic usages of their ancestors "to the Government's native subjects." Further the rights granted to the Zamindars were the latter's private rights as is indicated by some other words in that same paragraph namely, that the Government was resolved to institute Courts of Judicature *for the protection of these valuable rights*. The Zamindar's private rights however valuable, can be surrendered to the Government unless such surrender is *prohibited* by Statute Law. It is significant again, that this paragraph (two) of the old form of sanad has been omitted from the new form of sanad (page 154) as inappropriate to a title deed.

In the result I would hold that the suit is cognisable by the District Munsif and setting aside the order of the District Judge returning the plaints for presentation to the Revenue Courts. I would remand the suits for rehearing of the Appeal No. 429 of 1914 presented to it, and for fresh disposal on the other points raised in the appeal grounds in the memoranda presented to the District Court other than the questions by the 3rd and 4th issues framed in this suit. This judgment governs all the connected cases, one of the results being that similar orders will be issued in C. M. A. Nos. 237 to 246.

The Memorandum of objections in these appeals relate to the District Court's orders as to costs. As the District Court's orders have been wholly set aside it is unnecessary to deal with the objection memoranda.

C.R.P. Nos. 365 to 369/15 and 58 to 64 of 1915 are allowed and the Subordinate Judge's orders in these suits directing the plaints to be presented to the Revenue Court will be set aside

and the Court of First Instance will be directed to dispose of these suits itself.

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C. R. P. Nos. 676 to 680 of 1914 and 49 to 54 of 1915 will stand dismissed with costs.

Costs in the C. M. As. and the other C. R. Ps. incurred hitherto will abide.

Napier, J:—The first point taken before us in this second appeal is that the learned Judge has not decided as a question of fact what ought to have been so decided but has considered himself bound by the decision in 38 Mad. 620 to hold that the services of the Inam are such as to make it certain that the whole melvaram interest in the land was taken into consideration for the purposes of Permanent Settlement. For the respondent, our attention is invited to paras. 7 and 9 where a number of Exhibits are considered. It is unfortunate that the District Judge did not realize that the question of the nature of the services was one of the points for determination within the meaning of O. 41 R. 31 and state it accordingly. From the fact that he has not done so, I am strongly inclined to think that he considered the above decision to have disposed of that question all the more so as it was on appeal from his Court. In para. 3 he refers to the fact that the District Munsif has well discussed the duties in his judgment and accepts his conclusion drawn, but I cannot find anywhere a decision on the question whether those duties were so personal and private to the Zemindar as to lead to a presumption in one direction. Still less, do I find any examination of the evidence to see if that presumption is rebutted or strengthened. He states only two questions. The first is whether the resumption of the Inam by the Government even though *acquiesced in by the Inamdar i. e.*, the Zemindar would have the effect of converting the land into Ryotwari. This assumes that the consent of the Inamdar would affect the position which is the very point in issue for if it was an excluded Inam, the right of Government to resume on the admitted discontinuance of the duties would be unaffected by the consent or refusal of either the Inamdar or the Zemindar only to safeguard his collections, and assumes that a presumption of inclusion would arise. Having raised that presumption he passes away from the question altogether and considers the effect of resumption and of the consent of the Zemindar. He then goes to the question what rights had the tenants in 1903 and it is to decide that question that he

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examined the evidence in the case and not for the purpose of answering the important question of inclusion. In my opinion he should have examined the evidence and not relied on a presumption unless the evidence was inconclusive.

In *Venkatarangayya Appa Row* v. *Appalaraju* [1] a case from the same district the learned Judges had to deal with a case of minstrel service, a much more private service than that in this case and stated the presumption of inclusion strongly but they remitted it to the District Court for a finding whether the land was Lakhiraj and in 38 Mad. at p. 624 the question is stated to be purely one of fact. I have dealt with this point at length because I find myself unable to agree with the view expressed by my learned brother that he should accept the finding of the Lower Appellate Court, and the further view that the finding is correct. On this latter point, I desire to express no opinion. I have a great dislike to deciding questions of fact on presumptions where there is evidence and I differ with my learned brother in thinking it *prima facie* unlikely that Government would have consented to exclude these service Inams at the time of Permanent Settlement. I should require more evidence as to the nature of the armed police force available at that time to guard, the revenue two-thirds of which belonged to Government and I think care should be exercised lest one unconsciously applies one's knowledge of conditions existing at present to a state of affairs fifty years before any organsied police force came into existence. There is however no necessity to express an opinion on the point or to call for a finding as I agree with my learned brother that these lands have become Ryotwari by agreement between Government and Zemindar. Like my learned brother, I express no opinion whether an agreement made after the Madras Estates Lands Act would operate in the same manner or whether it would have had any effect if the lands in question had been held by tenants having at the time rights of permanent occupancy and if so, what effect. Such questions do not arise here. But I can see no reason why apart from those considerations a Zamindar or Inamdar should not be at liberty to agree to waive his special rights and submit to ordinary ryotwari assessment. The Zamindar has clearly done so and he accepts the position. I therefore agree with the order proposed by my learned brother.

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1. (19.0) 20 M L. J. 728

PRIVY COUNCIL.

Present:—The Lord Chancellor, Viscount Haldane, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

Suna Ana Arunachellam Chetty and others .. *Appellants* *

v.

S. R. M. Ramaswami Chetty .... *Respondent.*

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Aruna-chellam Chetty *v.* Ramaswami Chetty.

Will—In perfect form and proved—Court not to re-create the will that the testator ought to have made.

When a will has once been made and is apparently in perfect form and the evidence of the attesting witness is to be trusted, few things can be more dangerous than to attempt to recreate the kind of will that the man ought in the opinion of the Court to have made Once the man's mind is free and clear and is capable of disposing of his property, the way in which it is to be disposed of rests with him and it is not for any Court to try and discover whether a will could not have been more consonant either with reason or with justice.

Appeal from a judgment of the High Court at Madras (Sankaran Nair and Abdur Rahim, JJ.) in A. S. No. 242 of 1909 which reversed the judgment of the District Judge of Madura, in O. S. No. 4 of 1908.

The facts are sufficiently stated in the judgment.

DeGruyther, K. C. and *Dube* for the Appellant.

Sir R. Finlay, K. C. and *K. Brown* for the Respondent.

The judgment of their Lordships was delivered by

Lord Chancellor:—Two questions are raised in this appeal: the one is whether the appeal is competent to the appellants, and the other whether a will, which was executed on the 10th November, 1904, by one Subramanian Chetty, is or is not a good and valid testamentary document.

With regard to the first point, their Lordships desire to express no opinion. In the view that they take of this case its decision is not material, and their opinion must not be taken to involve an assumption that the appellants have a sufficient interest to enable them to maintain the appeal.

With regard to the other question, it is clear that the Judgment of the Judge of the District Court, which was in the

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* 21st February 1916.

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appellants' favour, can only be supported if the evidence of a doctor, Dr. Van Allen, be disqualified, because either it is untrustworthy owing to faulty recollection, or, if accepted, does not go far enough to establish the validity of the will. If, therefore, their Lordships considered the doctor's evidence accurate and adequate, it would be unavailing for counsel to ask the Board to examine the detailed story of the other witnesses who were called before the District Court.

Their Lordships have given careful and close attention to the evidence of Dr. Van Allen, and are clearly of opinion that reliance can safely be placed on it in all material respects, and that it does fully and sufficiently establish the validity of the will that is in dispute.

From this evidence it appears that the deceased was operated on by Dr. Van Allen on the 9th November, 1904, in the American Hospital at Madura. He was operated on for a carbuncle, but he was, and he had for some time past to the doctor's knowledge been, suffering from diabetes. On the day following the operation the doctor observed from certain symptoms that there was a prospect of the patient sinking under the shock. He accordingly, at noon on the 10th November, told him or his friends that he had better see to his affairs, and accordingly vakils were called in who prepared the document which is in dispute. The doctor says that he saw the will signed by the testator. He says that he was with him for half an hour, during which he signed and he (the doctor) attested. The doctor also saw a man taking notes, apparently at the dictation of the testator, though he did not hear what passed between them, and at 9 or 10 in the evening, after the signature of the document, the deceased left the hospital in a state of great weakness, and within a few hours died.

Now the doctor's evidence is quite clear that, in his opinion, the deceased was perfectly capable of understanding a business transaction, and understood what he was doing at the time when he executed the will. He gives several reasons, the chief of which, repeated from time to time, is that he could tell by the appearance of the face and eyes of the patient; this appears to have been regarded as unsatisfactory by the District Judge, who thought that it was not a means by which the doctor could ascertain the strength and intelligence that was left to the dying man.

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Their Lordships are quite unable to accept the view of the learned Judge in this matter. There are many signs by which a doctor can determine whether a man's mind is sound or no, and certainly not the least important is the character and appearance of the man's eyes and expression.

But the matter does not rest there because the doctor says himself that he was talking to the patient throughout the day trying to cheer him up, though whether he spoke to him at the moment when his will was executed or immediately afterwards is not made plain.

Their Lordships think that the real fact that explains the judgment of the District Judge is this: When the will is examined it appears that the last page has the writing inconveniently crowded above the signature of the testator; and the last page but one has also at the foot of the page writing so placed as to lend colour to the suggestion that the page had been filled up after the signature had been attached. It goes no further than that; but upon that it appears that the learned Judge has built up a theory of a dishonest conspiracy with regard to the preparation of this will, which their Lordships are clear Dr. Van Allen's evidence completely destroys. If the view were right that this will had been written on blank pages over signatures of the testator previously obtained, it would have been quite impossible for Dr. Van Allen to have said, as he did again and again, and he saw the deceased execute the will, and it would have been equally impossible for Dr. Van Allen to have attested on the last page of the will the signature of the deceased without noticing that there was no writing whatever over it. Remembering his responsibilities, as he clearly did, as an attesting witness, he would have been quite unable, if the paper was blank, to have come and said, in the plain words which he used, that he saw the signature of the deceased attached to this document.

These are the reasons that convince their Lordships that, whatever may be the true cause of the inconvenient way in which some of this writing appears, the explanation is not and cannot be the one that the learned Judge has assigned; it would indeed be most unsafe and most undesirable in circumstances

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such as these to try to spell out from the peculiar form in which a document written in the vernacular appears a hypothetical answer to the clear, distinct, and trustworthy evidence of the doctor who witnessed the will.

Their Lordships only desire to add, in conclusion, this: When a will has once been made and is apparently in perfect form, and the evidence of the attesting witness is to be trusted, few things can be more dangerous than to attempt to recreate the kind of will that the man ought, in the opinion of the Court, to have made. Once the man's mind is free and clear and is capable of disposing of his property, the way in which it is to be disposed of rests with him, and it is not for any Court to try and discover whether a will could not have been made more consonant either with reason or with justice.

Their Lordships see no reason whatever to doubt that the view that has been taken by the High Court of Judicature at Madras is correct, and they will humbly advise His Majesty that this appeal be dismissed with costs.

Solicitors for Appellants:—*T. L. Wilson & Co.*,

Solicitors for Respondent:—*Douglas Grant.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir John Wallis, Kt., Chief Justice and Mr. Justice Srinivasa Aiyangar.

Malaimel Thiruvenkatachariar and another ... *Appellants* * *(4th and 5th Defendants).*

v.

Pari Seshadri Iyengar and others. ... *Respondents (Plaintiff and 1 to 3 Defendants).*

Thiruvenkatachariar v. Seshadri Iyengar.

Trusts Act, S. 91—Transfer of Property Act, Ss. 40, 54—Contract to sell immovable property—Conveyance of the property to another having notice of the contract—Subsequent conveyance by the vendor to the first Contractee—Delivery of possession to first Contractee—Suit in ejectment by the first vendee—First Contractee can defend his possession—Specific Relief Act, S. 27.

Defendants 1 to 3 contracted to sell certain immovable property to defendants 4 and 5 but sold the property by a registered sale deed to the plaintiff who had notice of the prior contract. Subsequently defendants 1 to 3 executed a registered sale deed of the same property to defendants 4 and 5 in pursuance of the prior contract and put them in possession.

In a suit in ejectment by the plaintiff, *held,* that having regard to the duty imposed upon the plaintiff by S. 91 of the Trusts Act, plaintiff was not entitled to recover possession from defendants 4 & 5.

Lakshmi Doss v. *Roop Laul* [1] followed.

Kurri Veera Reddi v. *Kurri Bapi Reddi* [2] distinguished.

Second appeal against the decree of the District Court of Chingleput in A. S. No. 226 of 1913, preferred against the decree of the Court of the District Munsif of Conjeevaram in O. S. No. 23 of 1912.

The facts are fully stated in the judgment.

S. T. Srinivasagopalachari for Appellants.

C. Narasimhachari for Respondents.

The Court delivered the following

The Chief Justice.

Judgment:—*The Chief Justice*:—In this case the plaintiff sues to recover property in possession of defendants 4 and 5. Defendants 1 to 3 first contracted on the 12th July 1911 to sell the property to the defendants 4 and 5, then on the 11th September 1911 sold it by registered sale deed to the plaintiff who had notice of the previous contract and subsequently on the 17th October 1911 executed a registered sale deed in favour of defendants 4 and 5 and put them in possession, after which the plaintiff instituted the present suit O. S. 23 of 1912 for possession. The Lower Appellate Court has decided that, as the defendants 4 and 5 have not obtained a registered sale deed they are not entitled to possession citing the

* S. A. No. 966 of 1914. 13th March, 1916.

1. (1906) I. L. R. 30 M. 169. 2. (1904) I. L. R. 29 M. 336.

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The Chief Justice.

Full Bench decision, in *Kurri Veerareddi* v. *Kurri Bapireddi* [1]. That however was a suit by the plaintiff to recover possession from the defendant who had not obtained a registered sale deed but only a contract to sell. Here the plaintiff has obtained a transfer by a duly registered document from defendants 1 to 3 with notice of the prior contract by these defendants to sell the property to defts. 4 and 5. In this state of things he is bound by S. 91 of the Indian Trusts Act to hold the property for the benefit of defendants 4 and 5 to the extent necessary to give effect to the contract. No such statutory obligation is imposed on the original owner who refuses to carry out his contract to sell and the decision in *Kurri Veerareddi* v. *Kurri Bapireddi* [1] is therefore distinguishable. The question then is whether the defendants 4 and 5, who in the absence of a registered conveyance, have no right to recover possession of the property, can defend their possession as against the plaintiff by reason of duty imposed on him by S. 91 of the Indian Trusts Act to hold the property for them so far as may be necessary for the performance of the contract with defendants 1 to 3. In *Lakshmi Doss* v. *Roop Laul* [2], a defendant who had made a transfer under circumstances which entitled him to avoid it was held by a Full Bench to be entitled to retain his possession against the transferee though he had not sued to set it aside and such a suit had become barred. Similarly in the present case, it seems to me, that defendants 4 and 5 are entitled to resist the plaintiff's suit for possession by virtue of the duty they are under to hold the property for the benefit of defendants 4 and 5 by virtue of S. 91 of the Indian Trusts Act. Though the provision would not enable the 4th and 5th defendants to sue for possession without at the same time praying for a conveyance, there is, as pointed out in *Rajah of Ramnad* v. *Arunachalam Chettiar* [3], a great difference between the position of a plaintiff and a defendant in such a case, and I think it is quite unnecessary to deprive the defendants 4 and 5 of possession and drive them to another suit. This is also the decision in *Puchha Lal* v. *Kunj Behari* [4], I would therefore reverse the decrees of the Lower Courts and remand the suit to the first court for trial of issues 2, 3 and 4. Costs will abide.

Srinivasa Aiyangar.

Srinivasa Aiyangar, J:—The question whether defendants 4 and 5 are entitled to resist the suit for possession by the plain-

1. (1904) I. L. R. 29 M. 336.
2. (1906) I. L. R. 30 M. 169.
3. (1913) 24 M. L. J. 592.
4. (1913) 19 C. L. J. 213.

Thiruvenkatachariar v. Seshadri Iyengar.

Srinivasa Aiyangar, J.

tiff, who has now got the title, has to be determined by a consideration not merely of the provisions of S. 91 of the Trust Act but also of S. 40 of the Transfer of Property Act and S. 27 of the Specific Relief Act. All the three sections enact in substance the right of a person who had obtained a contract of sale, to enforce the contract against a person who has subsequently obtained a legal title to the property from the vendor; the contract by itself does not create a right *in rem*, but only creates a right *in personam* against the vendor and that obligation is made enforceable against the subsequent purchaser, as an obligation *in personam* to a limited extent, namely, to the extent of compelling him to give effect to the previous contract by way of specific performance, though he is not liable in damages as the original vendor would be. The language of S. 91 of the Trust Act is that the subsequent transferee "must hold the property for the benefit of the latter to the extent necessary *to give effect to the contract.*" It is clear therefore that the subsequent transferee is not a simple trustee for the person holding the contract, but he is only a person who holds the property for the benefit of the contractee to the extent necessary to give effect to the contract. If the contract by itself does not create a right *in rem* in the property contracted to be sold (as is now settled by the decision of the Full Bench in *Kurri Veerareddi* v. *Kurri Bapireddi* [1],) it cannot have any greater effect as against the transferee with notice. The person holding a contract for sale can undoubtedly bring a suit as plaintiff to enforce that contract against the subsequent transferee and obtain a conveyance from him, *Potter* v. *Sanders* [2], *Daniels* v. *Davison* [3]; and in the same suit, he may be entitled to recover possession of the property, although strictly speaking his right to such possession would accrue to him only after the execution of the conveyance. In *Gaffur* v. *Bhikaji* [4], the plaintiff who had obtained a sale deed from his vendor sued to recover possession from a person to whom his vendor had sold the property with notice of the agreement for sale but before the actual conveyance. S. 91 of the Indian Trust Act was considered and the plaintiff was given a decree for possession against the subsequent purchaser but the correct form of the decree was said to be a decree for conveyance by the defendant to the plaintiff. A similar view

1. (1904) I. L. R. 29 M. 333. 2. (1843) 6 Hare, p 1. 67 Eng. Rep. 1057.
3. (1811) 17 Ves. p 433. 34 Eng. Rep. 167. 4. (1901) I. L. R. 26 B. 159.

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was taken in a case in this court, *Gudur Ranga Reddi* v. *Gundala Pitchi Reddi* [1]. In that case specific performance against the vendor and the subsequent transferee with notice, was directed by ordering that the conveyance should be executed by both the vendor and the transferee.

In the case of a simple trust, where the trustee is a bare legal owner the *cestui que trust* may be entitled to possession of the property and may compel the trustee to place him in possession. If however the trust is an active trust, that is if the trustee has to perform any duties in connection with the trust property, the *cestui que trust* is not entitled to possession as a matter of right, though the court can in its discretion give possession. See Lewin on Trusts, page 847; Perry on Trusts, Ss. 328 and 329; Underhill on Trusts, page 363; and Godefroi on Trusts, page 431.

The further question which is the only one which arises in this case is whether a person who is actually in possession under a prior agreement for sale could be deprived of his possession by a subsequent purchaser on the strength of his title. In *Kurri Veerareddi* v. *Kurri Bapireddi* [2], already referred to, this court has held that as against the vendor himself he cannot keep possession, though, undoubtedly, he would be entitled to enforce the contract by calling for a conveyance. But the difference between that case and the present case is that chapter 9 of the Indian Trusts Act contains no provision which imposes an obligation on the vendor to hold the property as a trustee for the contractee. I must, however, confess that on principle this should not make any difference. In the first place it was wholly unnecessary to enact that the seller should hold the property for the benefit of the purchaser to the extent necessary to give effect to the contract, for that is his obligation under the contract itself. The need for S. 91 arose, because the obligation of the original seller was made enforceable against the subsequent transferee with notice. If by the contract of sale the purchaser obtained no kind of interest in the property, if the ownership was wholly in the seller, and if by virtue of such ownership he is entitled to eject the purchaser as if he were a trespasser, it is difficult to see why a transferee from him should be in a worse position. In *Kolathu Aiyar* v. *Ranga Vadhyar* [3], the learned Judges seem to think that such a transferee can recover possession.

1. (1914) 1 L. W. 879.
2. (1904) I. L. R. 29 M. 336.
3. (1913) 24 M. L. J. 81 at 87.

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Questions have arisen as to the position of persons bound by obligations in the nature of trusts under one or other of the sections contained in chapter 9 of the Trusts Act, and in these cases it has been held that a person in possession of the property is entitled to resist a claim for possession on the part of those who are bound by such obligations, by pleading such an obligation, though an action by him as plaintiff to enforce that obligation by calling for a conveyance or by setting aside a conveyance already executed, under some one or other of the provisions of the Specific Relief Act, may have been barred by limitation. Though there have been observations here and there in this court, see *Roop Laul* v. *Lakshimi Doss* [1] per Subramania Aiyar, J.; *Raja Rajeswari Dorai* v. *Arunachallam Chettiar* [2] per Sadasiva Aiyar, J. that a defendant in possession who had not taken steps to set aside a conveyance or to call for a conveyance within the time limited by law is not entitled to resist a suit for possession by the legal owner, it may be taken as settled so far as this court is concerned by the decision of a Full Bench in *Lakshmi Doss* v. *Roop Laul* [3], that persons in possession, who have parted with their ownership by a legal conveyance which they are at liberty to repudiate, can by virtue of the possession plead the invalidity of the plaintiff's title as against them and prevent the plaintiffs from recovering possession on a defeasible title. In *Madagula Latchiah* v. *Pally Mukkalinga* [4], the contract between a suit to recover possession in defeasance of the legal title after the time limited to set aside that title, and a suit in which the plea that the plaintiff has a defeasible title is set up to defend the possession, is clearly brought out. The various provisions in chapter 9 of the Trusts Act were discussed at length in *Raja Rajeswara Dorai* v. *Arunachallam Chettiar* [2] where also the same principle was laid down, though Sadasiva Iyer, J. was inclined to doubt the correctness of the decision in *Lakshmi Doss* v. *Roop Laul* [3]. These were however cases where the defendant in possession was the original owner who had conveyed the property to the plaintiff under circumstances which entitled him to rescind, and in which he defended his possession on his original title which did not pass absolutely to the plaintiff. In cases, however, where the defendant in possession was not the owner at any time, but was only entitled to get a transfer of the ownership, as a personal

1. (1905) I.L.R. 29 M. 1 at p. 12.
2. (1913) I. L. R. 38 M. 32 at 337.
3. (1906) I. L. R. 30 M. 169.
4. (1907) I. L. R. 30 M. 393.

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obligation, it is difficult to distinguish on principle the decision in *Kurri Veerareddi* v. *Kurri Bapireddi* [1] and hold that he is entitled to resist the transferee's suit for possession. There is however the provision in S. 91 of the Trusts Act, and it is unnecessary to extend that decision to cases of transferees. After all, in legal theory, there does not seem to be any difference between the position of a buyer under a contract of sale in England and under the Indian Statute, Maitland's Equity, p. 111. In *Namasivayam Pillai* v. *Nellayappa Pillai* [2], on a consideration of the several statutory provisions as regards subsequent transferees with notice, it was held that he cannot sue to recover possession from a person who had a prior contract for sale. This decision was not referred to or overruled by the decision of the Full Bench. The same view was taken in *Puchha Lal* v. *Kunj Behari* [3], which has been followed in a still more recent case in Calcutta, *Khagendra Nath Chatterjee* v. *Sonatan Guha* [4]. Whether even the original vendor can recover possession, if he had delivered possession in pursuance of an express stipulation in the contract of sale, it is unnecessary to consider. Such possession may enure till the conveyance is executed, when the purchaser would become entitled to possession not by virtue of the contract, but by virtue of his title (see *Doed Tomes* v. *Chamberlaine* [5], *Zimbler* v. *Abrahams* [6]). There is this further fact in this case; the 4th and 5th defendants have obtained a conveyance from their vendors. Though at the time of the conveyance to the said defendants they had already executed a sale in favour of the plaintiff, I am inclined to hold that they were still entitled to fulfil their original contract by executing a conveyance, at the request of the contractees, and to this extent repudiate the title conveyed to the plaintiff, not for their own benefit, but for the benefit of the 4th and 5th defendants and to the extent necessary to fulfil their obligation. The question whether the plaintiff was transferee for value without notice has not been tried. I agree the appeal must be allowed and the suit remanded to the first court for the trial of issues 2 to 4. Cost incurred hitherto will abide.

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1. (1904) I. L. R. 29 M. 336.
2. (1894) I. L. R. 18 M. 43.
3. (1913) 19 C. L. J. 213.
4. (1915) 20 C. W. N. 149.
5. (1839) 5 M. and W. 14.
6. (1903) I. K. B. 577.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Coutts Trotter and Mr. Justice Seshagiri Aiyar.

Palaniandi Chetty and others ... *Appellants* Legal representatives of the deceased (Plaintiff)*

v.

M. V. Appavu Chettiar and others ... *Respondents (Defendants).*

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C. P. C. of 1908—*Or.* 21, *R.* 63. *Unsuccessful claimant—Declaratory suit—Attaching decree-holders, defendants—Plea that sale was fraudulent under S.* 53 *of Transfer of Property Act—Validity—Fraudulent Sale—Remedy of persons defrauded—Representative action—Necessity — Judgment-creditors and ordinary creditors—Distinction—English and Indian Law—Judgment-creditors in England and India—Rights of—Distinction.*

Where, in a suit under Or. 21 R. 63 C. P. C. by a defeated claimant for a declaration that he was the absolute owner of the suit property by right of purchase from the judgment-debtor and that it was not liable to be attached and sold in execution of the decree, the decree-holders raised the plea that the sale-deed in favour of the plaintiff had been executed with intent to defraud creditors and was not valid as against him, *held* that, as the defendants had not sued to set aside the sale in favour of the plaintiff before they attached the properties in execution, they were not entitled to resist the claim of the plaintiff.

Per Seshagiri Aiyar, J.—Under S. 53 of the Transfer of Property Act it is open to any creditor to impeach a conveyance made by his debtor provided he alleges in the plaint that the sale was intended to defraud him and others similarly placed. A decree in such a suit will not give any personal right to the litigating plaintiff but would enure for the benefit of all creditors like himself. A representative action is not the only mode of setting aside the sale. But the conveyance is good and valid until it is so set aside and creditors have no remedy against the property sold until the sale is set aside. There is no distinction in this respect between a judgment-creditor and an ordinary creditor.

Distinction between the rights of a Judgment-creditor in England and in India pointed out.

English law reviewed.

Second Appeal against the decree of the District Court of Tanjore in A. S. No. 865 of 1912 preferred against the decree of the Court of the Subordinate Judge of Mayavaram in O. S. No. 47 of 1910.

A. Krishnaswami Aiyar for Appellants:—The attachment of the property by the defendants as the property of the Judgment-debtor is illegal inasmuch as there was an operative sale by the Judgment-debtor in favour of the plaintiff and it was not judicially set aside. A conveyance which is fraudulent under S. 53 of the Transfer of Property Act has to be set aside in a representative action instituted on behalf of all the creditors and until so set

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* S. A. No. 24 of 1915. 21st March, 1916.

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aside the property continues to be in the vendee. See *Hakim Lal* v. *Mooshahar Sahu* [1] *Burjorji Dorabji Patel* v. *Dhunhai* [2] *Ishwar Tinappa* v. *Devar Venkappa* [3]; *Reese River Silver Mining Co.* v. *Atwell* [4].

(At this stage C. V. Anantakrishnaiyar for the Respondents objected to the question being raised for the first time in second appeal.)

The suit here is by the vendee and not by the creditor. It does not make any difference whether the objection is taken in the First Court or here. If the suit was by the creditor, there would be force in the objection of the other side as the creditor could have amended the plaint in the First court.

There is no distinction in principle between the rights of a judgment-creditor and those of a simple creditor in this respect, The decisions in *Hakim Lal* v. *Mooshahar Sahu* [1] and *Burjorji Dorabji Patel* v. *Dhunhai* [2] were themselves cases of judgment-creditors; even in England, it has been held that it is not open to the judgment-creditor to treat the conveyances as void and to proceed to execute the decree against the property as if no conveyance existed. See *Vyse* v. *Brown* [5] *Glegg* v. *Bromley* [6].

May's statement of the law in his book on "Fraudulent and Voluntary Dispositions of Property" that there is a distinction in principle between judgment-creditors and ordinary simple creditors is not borne out by the authorities cited therein. In *Neate* v. *Duke of Marlborough* [7] and *Smith* v. *Hurst.* [8], the Sheriff as a matter of fact returned the writ unexecuted on the ground that there was no property of the Judgment-debtor available because of a prior conveyance by him. Then the Decree-holder filed a suit in the Chancery Court for cancellation of the conveyance impeaching the sale as fraudulent and for an injunction restraining the person claiming under the conveyance from interfering with the plaintiff's right to execute the decree. In those cases, therefore, a judicial setting aside was rendered necessary before the decree-holder could execute his decree. Again, even if the judgment-creditors are assumed to be on a Special footing under the English Law, there is no reason why

1. (1907) I. L. R. 34 C. 999.
2. (1891) I L. R. 16 B. 1.
3. (1902) I.L. R. 27 B. 146.
4. (1869) L. R. 7 Eq. 347.
5. (1884) 13 Q. B. D. 199.
6. (1912) 3 K. B. 474.
7. (1838) 3 Myl. & Cr. 407, 421.
8. (1845) 10 Hare 30.

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they should be treated alike under the Indian Law. A judgment-creditor, under the English Law, has a right of direct recourse against the property of the judgment-debtor and may take out the writs of *Elegit* and *Fi Fa* as regards lands and goods respectively, a judgment-creditor has the right to enter upon the land. He has no such special rights under the Indian law.

C. V. Anantakrishnaiyar for Respondents:—The necessity for a representative action is not borne out even by the English decisions and ought not to be recognised here. There is nothing in S. 53 of the Transfer of Property Act to warrant such a view and there is nothing in the Civil Procedure Code enjoining such a course. Under S. 53 the transfer is voidable at the option of any creditor and the avoidance need not be in any particular form. The language of S. 53 is not in *pari materia* with the Statute of Elizabeth. The practice in this court has always been to permit the decree-holder to attack the conveyance as fraudulent in execution proceedings. See *Narayanan Patter* v. *Veeraraghavan Patter* [1] *Chidambaram Chetty* v. *Sami Iyer* [2]. Even in England a judgment-creditor is treated on a special footing. The alleged distinction between judgment-creditors in England and in India has no bearing upon the present question. The case in *Ishwar Tinappa* v. *Devar Venkappa* [3] is not a case of a judgment-creditor. The Indian courts are not fettered by the distinctions of Common Law and Equity and the artificial distinctions of English Law need not be perpetuated here.

A. Krishnaswami Aiyar in reply:—There is no difference between S. 53 and the language of the Statute of Elizabeth excepting that the expression "void" occurs in the latter, while "voidable" occurs in the former. The expression "at the option of any person" merely means that the proceedings may be initiated by anyone of the creditors. But the intent required by the first half of the section is a general intent to defraud. Whether or not there is a general intent cannot be decided unless the action that is constituted is a representative action.

The Court delivered the following

Coutts Trotter J.

Judgments:—*Coutts Trotter, J.*—Although this appeal raises questions of difficulty and importance the facts material to it can be stated very shortly. The plaintiff sued for a declaration that

1. (1899) I. L. R. 23 M. 184. 2. (1906) I. L. R. 30 M. 6: 16 M. L. J. 427. 3. (1902) I. L. R. 27 B. 146.

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he was the absolute owner by purchase of the suit properties as against the defendants who were holders of decrees against his vendor. The plaintiff's title was based on a sale deed dated the 5th of September 1903, from Velayudham Chetty to himself for a consideration of Rs. 14,250. It has been found that this deed and the transaction which is carried out was brought into existence with intent to defraud and defeat the creditors of the transferor, and that finding is not and cannot be challenged, but the appellant contends that it is not competent to the defendant to invoke that finding in aid in the present proceedings. For the moment, I am assuming that the transaction in question, was in this sense a real one, that it effected and was meant to effect a real transfer of the property from the transferor to the transferee, that is to say, it was not a merely colourable paper transaction, leaving the real beneficial enjoyment of the property with him who purported to transfer it. Had the transaction been a merely colourable one, it would no doubt have been void and the plaintiff could not have succeeded in his action. His contention is that if it is only voidable it stands good until set aside in proceedings appropriate for the purpose, such proceedings being a suit brought for the express purpose by or on behalf of all the creditors of the transferor.

The material section is S. 53 of the Transfer of Property Act which is as follows: "Every transfer of immovable property made with intent to defraud, prior or subsequent transferees thereof for consideration or co-owners or other persons having an interest in such property or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed."

The section broadly reproduces the effect of the famous Statute of Elizabeth 13 Eliz. C. 5 and the English decisions on that Statute are always referred to in India as authorities for the construction of the Indian section. In England it has been held that a suit to avoid, a settlement must be brought on behalf of all creditors, (*Reese River Silver Mining Company* v. *Atwell* [1]) and that decision has been followed in India in *Hakim Lal* v. *Mooshahar Sahu* [2] and *Burjorji Dorabji Patel* v. *Dhunbai* [3]. But it has been held by the English Courts

1. (1869) L. R. 7 Eq. 347. 2. (1907) I. L. R. 34 C. 999.
3. (1891) I.L.R. 16 B. 1.

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that where the plaintiff is a judgment-creditor who has sued out a writ of *Elegit* he may sue on his own behalf without reference to the general body of creditors and impeach the transfer as having been executed with intent to defraud his particular claim. *Blenkinsopp* v. *Blenkinsopp* [1]. That case expressly left open the question as to whether the deed could be set aside by a person who had signed the judgment but not sued out the writ. We are asked to say that in India the section may be called in aid by a creditor who has obtained a decree but has not attached the properties, it being conceded that a creditor who had attached the properties can use the section as a weapon of defence as well as of offence in a case like the present. See *Rajani Kumar Dass* v. *Gour Kishore Shah*, [2] *Chidambaram Chettiar* v. *Sami Aiyar* [3]. The matter has been definitely decided by the High Court of Bombay in *Ishwar Tinapa* v. *Devar Venkappa* [4], a decision to which Jenkins, C. J. was a party. In the absence of a decision of this court I propose to consider the matter on principle.

The remedy sought may be treated as the equivalent of a remedy by way of equitable execution, in aid of the legal right given by the Judgment. The English authorities subsequent to *Blenkinsopp* v. *Blenkinsopp* [1] seem clearly to show that such an equitable execution, will not be granted until the title of him who seeks it has been completed, that is to say, according to the technical language of the English law, a Judgment-creditor cannot invoke the equitable relief until he has followed up his Judgment by suing out a *writ* of *Fi fa* or *Elegit* as the case may be. This was expressly decided by Turner V. C. (as he then was) in *Smith* v. *Hurst* [5] and he cites in his Judgment an interesting passage from Lord Reddesdale's Treatise on Pleading. An authoritative and clear exposition of the principle on which Turner, V. C. founded his decision is contained in Lord Cottenhan's opinion in *Neate* v. *The Duke of Marlborough* [6]. Applying that principle I think it must be held that the mere obtaining of a Judgment in India creates no title or only an inchoate title in the Judgment-creditor; and therefore he must follow up his Judgment by attaching the properties in order to enable him to utilize S. 53 in answer to a claim founded on the impeached

1. (1852) 1 De G. M. and G. 495=42 Eng. Rep. 644
2. (1908) I. L. R. 35 C. 1051.
3. (1906) I. L. R. 30 M. 6.
4. (1902) I. L. R. 27 B 146.
5. (1855) 10 Hare 30. 68 Eng. Rep. 825
6. (1838) 3 Myl. and Cr. 407, at 421. 40 E. R. 983.

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deed of transfer. The inconvenience of allowing each and every creditor in turn to attack the deed independently is obvious and is amply illustrated by the history of the present plaintiff who has been compelled to buy off a series of creditors one after the other. Accordingly I am of opinion that *Iswar Tinappa* v. *Devar Venkappa* [1], was correctly decided and is in accordance with principle and I respectfully follow it. I therefore hold that the fact that the deed was executed with intent to defraud the creditors of the transferor affords the defendants no answer to the plaintiff's claim.

As the learned Judge has not decided the question as to whether the transaction is merely colourable the case must go back to him for a finding on the point.

Six weeks are allowed for submission of finding and 7 days are allowed for filing objections.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.—The property in this suit belonged to one Velayudham Chetty. He executed a sale-deed to the plaintiff in respect of it on the 5th September 1903. It is not disputed that at the time of the sale, Velayudham Chetty was heavily involved in debt. The defendants in this suit had a number of decrees against him, for sums of money due to them before the date of the sale to the plaintiff. They attached the properties in execution of their decrees. The plaintiff filed a claim petition which was rejected in September 1910. Thereupon he filed the present suit for a declaration that the property belonged to him by virtue of the sale and that Velayudham Chetty had no interest left in the property for the defendants to attach and sell. The Subordinate Judge who tried the original suit held that the sale was binding to the extent of Rs. 9,946 odd, as that sum was applied towards discharging certain mortgages upon the property created by Velayudam Chetty. He dismissed the suit as regards the rest of the claim put forward by the plaintiff. On appeal to the District Judge, the Subordinate Judge's decree was confirmed. In this second appeal a point was raised for the first time, by Mr. A Krishnaswami Aiyar to the effect that as the defendants had not sued to set aside the sale in favour of the plaintiff before they attached the properties in execution of their decrees, they were not entitled to resist the claim of the plaintiff in this suit. Mr. Ananthakrishna Aiyar objected to this contention

1. (1902) I. L. R. 27 B 146.

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being heard for the first time in second appeal, as he might have rectified the defect if the objection had been raised before the trial court. It is difficult to see what new evidence could have been let in by the defendants in answer to the abstract legal position argued in this court. The plaintiff's case is that at the time of the attachment Velayudham Chetty had no interest in the property because at that time no suit had been brought to set aside the sale in plaintiff's favour. To such a contention, if it is sound, the only answer will be that the sale had been set aside, in a properly framed suit. That is not the answer. The decision in *Hakinlal* v. *Mooshahar Sahu* [1], where it was pointed out that an objection like this should not be entertained in second appeal does not help the respondents. In that case the suit was brought by some of the creditors, and when objection was taken in second appeal, that the suit should have been brought in a representative character, it was met by the plea that if the objection had been taken in time, this defect could have been cured. That is not the present case. Although it is unfortunate that this question was not raised in the earlier stages, I do not see my way to refusing to hear the question argued.

On the merits the first contention of Mr. Krishnaswami Aiyar was that under S. 53 of the Transfer of Property Act, it is not open to anyone of the creditors of the transferor to challenge the validity of the conveyance. He relied on the observations of Mookerjee and Holmwood, JJ. in *Hakin Lal* v. *Mooshahar Sahu* [1]. In the first place, it should be pointed out that S. 53 does not in terms apply to the present case as it is in Chapter II which preserves to Hindus, Mahomadans and Budhists their own law on the question covered by its provisions. This will not however materially affect the decision as there is nothing in the Hindu Law which is inconsistent with S. 53 of the Transfer of Property Act. See *Rangil Bhai* v. *Vinayak Vishnu* [2]. At any rate S. 53 may be taken as indicating the principles of equity, justice and good conscience which ought to guide courts in the absence of specific legislative provisions. The decision in *Hakin Lal* v. *Mooshahur Sahu* [1] no doubt lays down that it is settled law in England that if the debtor is alive and not a bankrupt at the time the action is brought to set aside a conveyance on the ground that it was voidable under Statute 13

1. (1907) I. L. R. 34 C. 999. 2. I. L. R. 11 B. 666.

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Elizabeth, chapter 5, it should be by a creditor or creditors on behalf of himself or themselves and all other creditors of the debtor. The learned Judges say that the rule appears to be based upon a perfectly sound and intelligible principle and point out the difficulties which the contrary conclusion may lead to. Speaking for myself, there are as many difficulties in demanding that all the creditors should join in a representative action as there are in permitting a number of actions being brought against the same purchaser. However that may be, the language of S. 53 of the Transfer of Property Act, to my mind, is clear that any person who was defrauded, defeated or delayed can impeach the transaction.

Before dealing with the English Cases quoted by the learned Vakil for the appellant I wish to draw attention to S. 11, explanation 6 of the Code of Civil Procedure. That will apply to actions which may be brought by one of the defeated or delayed creditors if he claims a right which is common to himself and to other creditors similarly situated. It may be that S. 53 has been so worded having regard to the language of this explanation to S. 11 of the Code of Civil Procedure. The case in *Hakim Lal* v. *Mooshahar Sahu*[1] went up on appeal to the Judicial Committee but their Lordships did not decide the case on this point. See *Mooshahar Sahu* v. *Lala Hakim Lal* [2]. The only other Indian cases bearing on the question are *Burjorji Dorabji* v. *Dhunbai* [3], and *Ishwar Tinappa* v. *Devar Venkappa* [4]. Among a number of points decided by Mr. Justice Telang in *Burjorji Dorabji* v. *Dhunbai* [3], the learned judge points out that the plaintiffs in that suit were only some of the creditors and that they were not entitled to succeed inasmuch as the suit was not filed by them on behalf of and for the benefit of all the creditors. When this decision was passed the Transfer of Property Act did not apply to the Bombay Presidency and the decision proceeded solely upon English authorities. *Ishwar Tinappa* v. *Devar Venkappa* [4] was after the Transfer Property Act was applied to Bombay. It does not appear from the judgment that the learned Judges required that the other creditors should *eo-nomine* be parties to the suit. Some observation of the Judicial Committee in *Chaterput Singh* v. *Maharaj Bahadur* [5]

1. (1907) I. L. R. 34 C. 999.
2. (1915) 30 M. L. J. 116.
3. (1891) I. L. R. 16 B. 1.
4. (1902) I. L. R. 27 B, 146.
5. (1904) I. L. R, 32 C. 198 at p. 217.

were relied upon by the appellant. The observation that "such an issue could be raised and such a decree could be made only in a suit properly constituted for that purpose," do not necessarily imply that a representative action is the only mode of setting aside a fraudulent sale. Therefore I am of opinion on the language of S. 53 of the Transfer of Property Act that it is open to any creditor to impeach a conveyance made by his debtor provided he alleges in the plaint that the sale was intended to defraud him and others similarly placed. A decree in such a suit will not give any personal rights to the litigating plaintiff but would enure for the benefit of all creditors like himself.

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The English cases to which our attention was drawn do not in unmistakable terms lay down that all the creditors should join in a representative action before a fraudulent sale can be set aside. All that Justice Williams in *Vyse* v. *Brown* [1] held was that the settlement should not be treated as void but it was liable to impeachment in a proper action. *Clegg* v. *Bromley* [2] does not take the matter any further. But both these cases are authorities for the position that the assignment by the debtor will be good and valid until it is set aside in a proper proceeding. There are certain observations in May on Fraudulent conveyances which on their face appeared that a judgment-creditor was in a different position from an ordinary creditor and that it was open to the former by virtue of his Judgment to levy execution without having the assignment set aside in a suit for that purpose. The proposition is thus stated :—"Where a creditor has a Judgment or order of Court, or process of execution in respect of his claim, and might obtain relief in equity thereunder against property held by, or in trust for, his debtor and the debtor is living, a Court of equity can declare a settlement by the debtor which is fraudulent within 13 Eliz. C. 5 to be void against the plaintiff without also declaring it to be void against the creditors generally, and may direct the settled property, or a sufficient part of it, to be applied in satisfaction of the plaintiff's claim." When the cases cited for this proposition are examined they show that if a Judgment was obtained at common law, and a further action was brought in the Equity Court to have it declared that the settlement or conveyance by the debtor in fraud of creditors was void, the Court of Chancery will not move in

1. (1884) 13. Q. B. D. 199. 2. (1912) 3 K. B. 474.

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the matter until all the Common law remedies had been exhausted. See *Smith* v. *Hurst* [1], *Neate* v. *The Duke of Marlborough* [2], and *Rease River Silver Mining Co.* v. *Atwell* [3]. But since the judicature Act and since the Act of Edward I which define the rights of judgment-creditors, these decisions have no practical value. A judgment-creditor in England is in a very favourable position as compared with a judgment creditor in this country. He becomes practically the owner of the property which he seizes either under a writ of Elegit or of *fi fa.* I do not think the English decisions which differentiate between the position of the judgment-creditor and that of an ordinary creditor are of much use, in deciding Indian cases. The judgment-creditor in India for all practical purposes, is in the same position as any ordinary creditor. If he attaches the property it would give him no lien; if he realises monies they would be subject to participation by those who may be entitled to rateable distribution. But the position in England is altogether different. Therefore the passage in May relating to the judgment creditor has no relevancy in this country. Nor is there anything in the words of S. 53 to differentiate between the position of the decree-holder and that of an ordinary creditor.

The next question is whether the judgment-creditor can protect his rights to proceed against the property of the judgment debtor by pleading in defence that the sale which the plaintiff seeks to establish in the suit should be set aside. There is no question that if the sale is void or is found to be a sham transaction it will not be necessary either for the creditor individually or conjointly with others to sue to set aside the sale. But if it is only voidable it seems to me that the creditors can have no remedy against the property conveyed until the sale is set aside. It is well settled that in cases of voidable transactions until the transaction is avoided it continues in force. See *Raja of Ramnad* v. *Arunachallam Chettiar* [4], and *Mahamad Haji Zakaria* v. *Ahmad Bhai Habib Bhai* [5]. Therefore at the time that the creditor attached the property the sale was effective to confer title upon the plaintiff.

It was held by the Judicial Committee in *Phul Kumari* v. *Ghanshyam Misra* [6], that the effect of a decree in a suit brought

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1. (1845) 10 Hare 30.
2. (1838) 3 Mylne and Craig. 407.
3. (1869) 7 Eq. 347.
4. (1913) 24 M. L. J. 592.
5. (1900) I. L. R. 25 B. 327.
6. (1907) I. L. R. 35 C 202.

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by a defeated claimant is to place the parties in the position they occupied at the time the claim was put in. Consequently if the defendant succeeds in his defence the result of it will be to allow him to attach the property as if it were the property of the judgment-debtor. This, as I already pointed out, can do him no good so long as the sale is not set aside. Therefore I am of opinion that the defendant is not entitled to avoid the sale by his defence. Mr. Anantakrishna Aiyar drew our attention to *Vasudeo Ragunath* v. *Janardan Sadashiv* [1]. All that was decided in that case was that a subsequent transferee was not entitled to impeach a completed sale. It is true, that another answer to the defence could have been that the sale was subsisting at the time of the transfer. However, this is no authority for the position that without setting aside the sale a judgment-creditor can impeach the transaction as a defence to the action commenced by the purchaser. The point we have to decide was not considered in *Narayana Pattar* v. *Raghavan Pattar* [2], *Chidambaram Chettiar* v. *Sami Aiyar* [3], and *Ishan Chunder Das Sankar* v. *Bishu Sirdar* [4], to which the learned Vakil for the respondents invited our attention. I have therefore reluctantly come to the conclusion that the objection raised by Mr. A. Krishnaswami Aiyar should be allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Coutts-Trotter and Mr. Justice Srinivasa Aiyangar.

The Secretary of State for India in Council — *Appellant* (Defendant)*

v.

Pemmaraju Venkayya Garu (died) and another. — *Respondents (Plaintiff and L. R.)*

Secretary of State for India v. Venkayya Garu.

Lease—Covenant for quiet enjoyment—Breach—Suit for damages for—Limitation—Cause of action—Limitation Act of 1908, *Arts.* 115, 116—*Applicability—"continuous breach"—Meaning and illustration—Transfer of Property Act, S.* 108 *—Principle of—Applicability to Crown grants—Nature and scope of covenants provided by—Limitation Act of* 1908, *S.* 19—*Acknowledgment—Ambiguity in admission—Effect—Government and its servants—Acknowledgment by latter, if and to what extent binding on Government.*

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* A. No. 90 of 1912. — 18th February 1916.

1. (1915) I. L. R. 39 B. 507.
2. (1899) I. L.R. 23 M. 184.
3. (1906) I. L. R 30 M. 6.
4. (1897) I. L.R. 24 C. 825.

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Where the plaintiff, the lessee from the Government of a piece of land under a lease dated March 1896 for a period of 5 years, sued the Secretary of State on 11th March 1903 for damages sustained by him by reason of the Government's failure to put him in possession of a portion of the lands leased and it appeared that as early as 2nd July 1896 the plaintiff had demanded possession of that portion from the Government and failed to obtain it, *held* that limitation began to run from the time when the plaintiff became entitled to possession, i.e., from the date of the lease or at the latest from the 2nd July 1896 when he demanded possession from the Government and failed to obtain it and that the suit was barred.

Held, further, that a memorandum to the plaintiff from the Tasildar (*a*) communicating the order of the Collector stopping the collection of the kist due for the portion of the land not obtained by the plaintiff pending the disposal of the dispute regarding it and (*b*) demanding payment of the balance of the kist due by him did not amount to an unequivocal admission by Government that, as they had failed to give possession of a portion of the demised property, they were liable at least to remit a portion of the rent and was not an acknowledgment within the meaning of S. 19 of the Limitation Act.

Per *Coutts Trotter, J*:—The nature of the remedy available to a tenant under the covenant or the contract for quiet enjoyment depends upon the nature of the breach. The test as to whether a breach is continuous is this; if the plaintiff sues in damages, can he only sue for the damages actually accrued at the date of suit, or may he sue for the whole of the damage accrued and prospective that the breach will cause to him. In the former case, the breach is continuing; in the latter, it is single and final. The failure of a lessor to give possession of the demised lands to his lessee goes to the very root of the contract and is so fundamental a breach of it as to entitle the lessee to treat that breach as final, and bring an action forthwith for the whole of the prospective damages.

Per *Srinivasa Aiyangar, J.*—The covenant or the contract, express or implied, to place the transferee in possession operates in *praesenti* and that obligation is broken and broken once for all as soon as the transferor declines or is unable to place the transferee in possession. In the case of a lease the obligation is to place the lessee in possession in the beginning of the term. On the breach of this obligation the lessee is entitled to institute an action and recover the way of damages of the whole value of the term. The covenant or contract is not a continuing one and so there cannot be continuing breach.

The technicalities of English law as to covenants ought not to be imported into India.

Nature of covenants provided for by S. 108 of the Transfer of Property Act, discussed.

Though the provisions of the Transfer of Property Act do not apply to Crown grants, the provisions of S. 108 of the Transfer of Property Act may be referred to for the purpose of determining the nature of the ordinary covenants by which the lessor and the lessee are bound.

Appeal against the decree of the District Court of Godaveri in O. S. No. 13 of 1903.

The Government Pleader (Nugent Grant) for the Appellant.

T. Prakasam for the Respondent.

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Coutts Trotter, J.

The Court delivered the following

Judgments:—*Coutts-Trotter, J.*—This is an appeal by the Secretary of State for India in Council against a judgment of the District Judge of Godaveri awarding to the plaintiff a sum of Rs. 14,000, by way of damages. The facts of the case are comparatively simple, though the questions for determination are complex and difficult. The plaintiff in March 1896 acquired from the Collector of the Godaveri District, acting as agent for the Government, a patta, a lease of a piece of land called the Sidhantam Lanka at an annual kist of Rs. 6010 for a period of five years. These Lankas are islands formed in the bed of the river Godaveri by the silting up of solid matters brought down by its waters. They are extremely fertile and valuable for the purpose of cultivation, but their configuration and consequently their size is constantly varying owing to the action of the river; and it is often extremely difficult to delineate the exact boundaries of a particular lanka at any given time. The patta purported to convey the Sidhantam Lanka defining its "probable extent" as 777 acres 64 cents. The plaintiff entered into possession of the lanka, but found that 109 acres out of the 777 covered by the patta were in the possession of the Zamindar of Gopalapuram who contended that that portion of the land did not belong to the Sidhantam lanka at all but to his own lanka of Gopalapuram. The plaintiff complained to the Government and a prolonged dispute ensued between the Government and the Zamindar as to which of them really was entitled to the 109 acres. Into the merits of that dispute it is unnecessary to go. But so far as the plaintiff is concerned, the outcome to him was that he never at any time during the term of his patta got possession of any portion of the disputed area. In one fasli corresponding to the year 1898 it appears that an order was passed by the Collector remitting a third of the rent for that fasli in respect of the 109 acres; and this becomes material in considering a subsidiary question raised in this appeal which will be dealt with in its place. The plaintiff instituted the suit claiming damages against the Government on the 11th March 1903, more than six years from the date of his patta and from the date, *viz.*, the 2nd July 1896, when he demanded possession from the Government and failed to obtain it.

The defence put forward by the Government in their written statement was that the area given in the patta was only an

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approximate and rough estimate, and that all that the plaintiff was entitled to was that which should prove in fact to be the Sidhantam Lanka theretofore owned by the Government, that he took that which the Government had and no more, and that if part of the land which the parties supposed to constitute the Sidhantam Lanka should prove not to be part of it, he had no remedy.

At the first hearing in the District Court before the then District Judge, Mr. Hamnett, this contention prevailed. But on appeal to this Court it was upset and it was held that what was leased to the plaintiff included the 109 acres claimed by the Zamindar of Gopalapuram and that he was entitled in law to pursue any remedy in damages which that finding might entitle him to. At the same time Government was allowed by the learned Judges to take the point of limitation which had not been raised by them at the first hearing. The case accordingly went back to the District Court, and the then District Judge, Mr. Parthasarathy Aiyangar dealt with the two issues of limitation and of the quantum of damages, and he decided both in favour of the plaintiff. The Government have appealed from that decision, and the only questions that we are called upon to decide relate to their plea of limitation. Under that plea there are two questions for decision : First, whether the plaintiff's cause of action arose more than six years before suit was brought ; and secondly, whether if it did, there has been an acknowledgment sufficient to take the case out of the statute. It was suggested by the learned Government Pleader that in order to have the benefit of the latter contention, the plaintiff should have set it up either by amending his plaint or putting in a further statement in the nature of a reply alleging the acknowledgment and specifying the document or documents containing it. Having regard to the circumstances in which Government was allowed to avail itself of the plea of limitation, we are not disposed to give effect to the suggestion and are prepared to treat the plaint as amended by the addition of the necessary averments. Indeed on our intimation to that effect during the course of the argument the learned Government Pleader very properly did not press the point.

To determine the first point as to whether the plaintiff's case is *primâ facie* barred by limitation, it is necessary to see

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what is the exact nature of the plaintiff's cause of action. In the course of an interesting argument in which I received the greatest assistance from both the learned Counsel, a great many authorities were referred to, and the history of the various covenants suggested to be applicable to the case to some extent investigated. The Transfer of Property Act does not apply to Crown grants, but Section 108 of that Act sets out in a convenient form the implied contracts usually subsisting from lessor to lessee as follows :—"(b) The lessor is bound on the lessee's request to put him in possession of the property; (c) The lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption". The latter of these implied contracts corresponds to the familiar covenants for quiet enjoyment of English Law. Into the history of the former I will enquire presently. It is quite clear that the obligation to put the lessee in possession of the property was broken *quoad* the 109 acres in dispute in July 1906, and that that cause of action which the plaintiff undoubtedly possessed is barred by limitation. But it is argued on his behalf that he has a separate remedy in respect of the same failure to put him in possession under the contract for quiet enjoyment. It is argued that the contract for quiet enjoyment subsists throughout the lease, and that its breach is a continuing one, the remedy for which was available to the plaintiff at any time during the continuance of his term. If this contention is sound, then the plaintiff's suit is not barred.

The covenant for quiet enjoyment of English Law was a covenant appropriate to feoffments and conveyances of the fee simple in land and was naturally expressed or implied when leases, historically a much later method of dealing with real estate, became usual. Another usual and necessary covenant in conveyances of the fee simple was the covenant for title, whereby the settlor or vendor warranted to his alienee that he had a good title to the land which he was purporting to convey. To leases which conveyed only a chattel interest in land the covenant was inappropriate. All that the lessee could get or demand was possession for the stipulated period, and so long as he got that, not merely was the exact nature of his lessor's title no concern of his but it has always been a

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settled principle of English Law that he was estopped from denying or questioning it in any way. At the same time it was essential that he should be able to enforce the right to possession which the instrument of lease purported to confer upon him; and accordingly it was held as early as *Holder* v. *Taylor* [1] that the operative word *demisi* in a lease imported a covenant to put the lessee in possession. The point was there taken that as the lessee has never had possession and therefore had only what the English law called an *inter esse termini*, he could not sue on covenant. The Court overruled the objection and held that he could sue on this implied covenant to put him in possession involved in the word *demisi* and the Court proceeds to make the observation; "But if it were an express covenant for quiet enjoying, there perhaps it were otherwise." The main doctrine of *Holder* v. *Taylor* [1] was reaffirmed in later cases. See *e. g. Coe* v. *Clay* [2] and *Jinks* v. *Edwards.* [3] It is now a settled doctrine of English law and appears in India as S. 108 (b) of the Transfer of Property Act. Like its correlative the covenant for title, it is broken once and for all on failure to comply with it at the inception of the term.

The covenant for quiet enjoyment, on the other hand, undoubtedly has a continuous operation throughout the tenancy and preserves to the tenant his right of possession. The question has been raised whether it is available to a tenant who has never had possession at all, and whose interest is a mere *inter esse termini*. *Chitty*, J. in *Wallis* v. *Hands* [4] has held that such a person cannot sue on the covenant for quiet enjoyment. While not dissenting from that learned Judge's opinion, which was also the opinion of the Bombay High Court in *Ardesir* v. *Vajesing* [5] I do not think it desirable to base my judgment on grounds largely derived from the technicalities of the English law of real property, and prefer to put it on more general considerations. In my opinion the nature of the remedy available to a tenant under the covenant or the contract for quiet enjoyment depends upon the nature of the breach. The test as to whether a breach is continuous is this: if the plaintiff sues in damages, can he only sue for the damage actually accrued up to the date of suit, or may he sue for the whole of the damage accrued and prospective that the

1. (1618) Hobart 12.
2. (1829) 5 Bing. 440.
3. 11 Exch. 775.
4. (1893) 2 Ch. 75.
5. (1901) I. L. R. 25 B. 593.

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breach will cause to him? In the former case the breach is continuing, in the latter it is single and final. I think that the failure of a lessor to give possession of the demised lands to his lessee goes to the very root of the contract and is so fundamental a breach of it as to entitle the lessee to treat that breach as final; and bring an action forthwith for the whole of his prospective damages. The matter may be illustrated in this way. Suppose that a month after the date fixed for the commencement of the term, the lessor had for the first time tendered possession to the lessee; could he then compel him to take possession and accept compensation or reduction of rent for the month he had been out of possession? I think it manifest that he could not; and that can only be because the lessor's breach being final, it is not open to him to remedy it subsequently. I therefore hold that assuming the contract for quiet enjoyment to give a remedy to this plaintiff, there was a complete and final breach of that contract so far as concerns the disputed land at the inception of the term and that consequently limitation began to run against him then. In this view of the matter it becomes unnecessary to discuss the argument urged at the bar, *viz.*, that the plaintiff having got possession of a substantive portion of the demised land could not be regarded as having a mere *interesse termini* as to any other part of it. Whether he had an *interesse termini* or something more, the breach as to these lands was complete at the inception of the term and by remaining in possession of the rest of the lands throughout the term the plaintiff obviously showed his willingness to treat the breach as to the suit lands as a separate breach complete in itself. See also *Ardesir* v. *Vajesing* [1] on this point.

One other contention was urged by the respondent, *viz.*, that even assuming the period of limitation to run from the date alleged by the appellant, there is a subsequent acknowledgment sufficient to take the case out of the Statute. The acknowledgment is said to be contained in Exhibit H, which is a memorandum from the Tahsildar to the plaintiff and is in the following terms:

"The Collector in his No. 301/Rev. of 1898, dated 13-2-98, ordered that pending the disposal of the dispute regarding the Sidhantam Lanka obtained by you at an auction, the collection of one-third of the kist should be stopped and the remaining

1. (1901) I. L. R. 25 B. 593.

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sum collected. Therefore deducting one-third of the amount payable by you for this year out of the balance of the demand amount of Rs. 4,403-2-0 excluding Rs. 2,317-0-0 the amount paid by you towards the sum of Rs. 2,935-6-8 the demand amount payable for the months of January and February, the balance of Rs. 618-6-0 is still due. You must send that money this day only. As the Taluq chitta would be closed to-morrow please send the money immediately".

The contention is that this is to be construed as an admission by Government that as they had failed to give possession of a portion of the demised property, they were under a liability at least to remit a portion of the rent. It seems to me extremely doubtful whether the Tahsildar or even the Collector would have any authority to make any such admission; their authority in all probability would be limited to communicating the decision to remit the rent, and would not extend to making admissions of legal liability. But it is unnecessary, in the view that I take of the true construction of Ex. H, to decide this question. It is for the plaintiff to satisfy us that its language amounts to an unequivocal admission of liability and he has failed to do so. In my opinion, the language used is at least as consistent with a temporary suspension of a claim for the rent or at most with an *ex gratia* remission of that claim as with an acknowledgment that is legally irrecoverable. The document thus being at best ambiguous, I think that this contention of the plaintiff fails.

The appeal will accordingly be allowed and the suit dismissed; but having regard to the circumstances of the case, we direct each party to pay their own costs.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J.—The facts are fully set out in the judgment just delivered and it is unnecessary to repeat them.

This being a suit to recover damages for breach of a contract and there being no other specific Article, the Article of limitation applicable to the case is either Art. 115 or 116. The starting point is the same in both the cases though in the case of a contract in writing registered, the period of limitation is 6 years instead of 3 years. Although the obligation in this case is one which is implied from the relation of the parties, as that relation was constituted by an instrument in writing registered, the period of limitation is, according to the decisions of this court, 6 years just as if the obligation had been expressed in words in the writing.

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But whether the period is 6 years under Article 116 or 3 under Article 115 is immaterial in this case; for the suit was instituted more than 6 years from the date when the lessee should have got possession and less than 3 years after the expiry of the term, and the starting point for limitation in both cases is that provided for by the third column of Article 115. Under that Article time begins to run from when the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (*where the breach is continuing*) *when it ceases.* Unless the breach in this case was a 'continuing breach' the suit is barred by limitation. For the determination of this question, *viz.*, whether the breach was a continuing breach, it is necessary to examine the precise nature of the obligation undertaken by the defendant. On principle and in common sense, every person who purports to transfer property for value, agrees to place the transferee in possession, if and when the transferee is entitled to it, and if he does not do so, it is clear that he is liable in damages for the breach of that obligation, though the transferee may be in a position to bring ejectment to recover possession of the land transferred either from the transferor or from others who may be in possession without a lawful title. *Coe* v. *Clay* [1], *Jinks* v. *Edward* [2], Whether this obligation is incurred in the case of a gift need not be considered. I do not think it useful or necessary to consider whether any and what covenants could be implied by the use of certain technical words as *dedi*, *concessi* or *demisi*, nor to consider the exact nature or scope of such implied covenants, whether they ought to be called covenants for quiet enjoyment, or covenants for title whether such covenants last after the termination of the estate of the grantor or whether a person who has only an *interesse termini* can bring an action of covenant on breach of a covenant for quiet enjoyment (See *Markham* v. *Paige* [3] *Mostyn* v. *West Mostyn Coal and Iron Co.* [4], *Bandy* v. *Cartwright* [5], *Bayres and Co.* v. *Lloyd and Sons* [6], *Wallis* v. *Hands* [7], *Cloake* v. *Hooper* [8], and *Ludwell* v. *Newman* [9]), as I think it would be mischievous to introduce the technical rules of English Conveyancing or Real Property Law. The covenant or the

1. (1829) 5 Bing p. 440.
2. 11 Ex. Ch. 775.
3. (1908) 1 Ch., p. 697.
4. (1876) L. R. 1 C. P. D., p. 145.
5. 22 L. J. Exch., p. 285.
6. (1895) 2 Q. B. 615
7. (1893) 2 Ch. 75 at 85.
8. (1673) Freem (K. B.) 121.
9. (1795) 6 Term Reports, p. 458.

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contract, (in India there is no difference between a contract and a covenant or rather there is no such thing as a covenant except probably in cases governed by the English Law) whether express or implied, to place the transferee in possession operates in *praesenti*, and that obligation is broken and broken once for all as soon as the transferor declines, or is unable to place the transferee in possession. In the case of a lease, the obligation is to place the lessee in possession in the beginning of the term. (See *Drury* v. *Macnamara* [1], per Wightman, J.; also Woodfall's Landlord and Tenant, page 719). On the breach of this obligation the lessee is entitled to institute an action and recover by way of damages the whole value of the term.

From the very nature of the obligation it is clear that there cannot be a continuing breach, for the covenant or contract is not a continuing one. The Transfer of Property Act does not apply to Crown grants, and further the chapter relating to leases in that Act does not apply to agricultural leases; but the provisions of S. 108 regulating the rights and liabilities of lessors and lessees may usefully be referred to for the purpose of determining the nature of the ordinary covenants by which the lessor and the lessee are bound. Under the heading 'Rights and Liabilities' of the lessor in S. 108 of the Transfer of Property Act, by clause (*b*) it is provided that 'the lessor is bound on the lessee's request to put him in possession of the property' and by clause (*c*) 'the lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.' Clause (*c*) is the usual covenant for quiet enjoyment, and this covenant is, by the concluding words of that paragraph, expressly made to run with the land, while there is no such provision as regards the obligation provided for in clause (*b*). Likewise in the case of Sales under S. 55 clause (*f*) the obligation to give possession by a vendor to his vendee is prescribed. It is clear that the obligation to give such possession is not one which runs with the land, as the breach, if any, of the obligation takes place immediately on the transfer of property becoming complete. See Rawle's Covenants for title, pp. 204, 205, 207. The analogy if any is to a covenant for title, and in fact Brett J., in discussing the position of the lessee in a case similar to

1. (1855) 5 Ellis and Blackburn 612 at 617 : 25 L. J. Q. 5.

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the present says: "There has clearly been a breach of the covenant for title, and we think that without any eviction the lessees, though there was a lease of the whole at one rent, would have a right to refuse to incur the risk of committing a trespass on the part to which there was no title and to elect, instead of giving up the whole, to keep the part to which there was a good title, and have nothing to do with the other part, and sue for damages for the breach of the covenant for title. I do not think it necessary to determine whether there would in such a case be an apportionment of rent, because it seems to me that, whether there was an apportionment or not, the defendants would probably be entitled to some damages in respect of the breach of the covenant for title". See *Mostyn* v. *West Mostyn Coal & Iron Co* 1,

The covenant for title here mentioned is obviously not the ordinary covenant for title, for the lessor does not generally warrant that he has title, to grant the term which he purports to grant. See an interesting Article 39 S. O. Journal, page 444. It is now settled that a breach of a covenant for title is not a continuing breach. *Turner* v. *Moon* 2.

Assuming however that the obligation to place the lessee in possession is really part of the obligation undertaken by the covenant for quiet enjoyment construing that covenant as imparting an obligation to give possession in the beginning of the term and maintain it during the term, yet the breach of it does not necessarily constitute a continuing breach, though a covenant for quiet enjoyment is a 'continuing covenant' in the same way as a covenant to pay rent is. It is to be observed that in the case of continuing breach, the starting point is the time when the breach *ceases* and under Section 23 of the Limitation Act a fresh period of limitation begins to run at every moment of the time during which the breach continues. The object is obviously to prevent multiplicity of suits and to enable one action to be brought for all loss suffered during the whole period the breach continued. The article implies the right of the person committing the breach to resume performance of the contract. As stated in Sedgwick on damages, Article 89, it applies to cases where "a single act of the defendant may be of such a nature as to give rise to a continuous breach of his contract with the plaintiff which, however, the defendant, may bring to a close by

1. (1876) L. R. 1 C. P. D. 145 at 152. 2. (1901) 2 Ch. 825.

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resuming performance. In such a case each moment during which the injury is allowed to continue is really a new breach; and if action is brought during the continuance of the injury, compensation can be recovered for such loss only as is caused before the beginning of the action". Well known instances of a continuous breach are of covenants "to repair and keep in repair", or "to insure and keep insured." During the continuance of the breach any number of actions can be brought for compensation for loss caused before the beginning of the action, but in many cases the recovery can only be nominal as the lessee may make the repairs, or insure the premises, before the end of the term. Even in cases where the loss caused may be substantial as for instance in the case of a contract not to engage in a competing business, the ascertainment of such loss may be difficult. In these cases the person damnified is not obliged to bring successive suits for damages, but can wait and bring action once for all at the end of the term, when there is no possibility of future performance; or if during the continuance of the contract the obligor resumes performance, the obligee may bring his suit once for all, for all the damages sustained by him till then. In *Jocob* v. *Dum* [1] where there was a covenant build within a particular time and also a covenant to repair and keep in repair, it was held, that a covenant to build was broken once for all on the expiry of the time limited; but it was also held on the language of the particular covenant, that the covenant to repair also included a continuing covenant to build. It is to be observed that in that case the lessor was, during the term entitled to the rent and at the end of the term to have back the land demised, together with the buildings which the lessee covenanted to build and keep in repair; the lessee might have performed his covenant by building before the expiry of the term and although the lessor might have sued for a breach of the covenant he could not possibly have recovered the whole value of the building but only the loss sustained by him owing to the now existence of the building at the particular time when he brings the suit (and that is likely to be merely nominal) and a recovery in such a suit would not prevent him from instituting another suit for subsequent loss arising from the non-existence of the building between the date of the first suit and the second. In cases of failure to deliver possession, the lessor if he fails to deliver possession at the commence-

1. (1800) 2, Ch. 156.

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ment of the term cannot subsequently insist on performance, nor can the lessee after having instituted a suit for damages for non-delivery of possession, in which he is entitled to recover the whole value of the term, again institute a suit for non-delivery after the institution of the first suit. Even a subsequent eviction, by paramount title, of the lessee, from the whole or a portion of the demised premises does not constitute a continuing breach of the covenant within the meaning of Art. 115. The lessee so evicted can on eviction bring his action and recover as damages the whole value of the remainder of the term and would not be entitled to bring another action. Redman, Landlord and Tenant, page 244. No doubt if the eviction was from a portion of the premises and if there is a subsequent eviction from another portion and so on, the lessee may bring successive actions, in each of which he would be entitled to recover the value of the lands from which he was evicted from the remainder of the term, but that would not be a case of a continuing breach but that of successive breaches of the same covenant. The dictum of Green J. in *Raju Babu* v. *Krishna Row Ramchundar and another* [1] does not apply to every case of a breach of the covenant for quiet enjoyment irrespective of the fact, as to whether the breach consists in mere disturbance in the enjoyment in a wrongful eviction of the landlord or by a third party by virtue of a paramount title. The period of limitation, therefore began to run from the time when the lessee became entitled to possession, *i. e.*, from the time of the lease or at the latest from the 2nd July 1896 when he demanded possession from the Government and failed to obtain it.

On the question of acknowledgment, I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present: Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

Seshappier ... ... *Appellant (Petitioner, 3rd Deft.)*

v.

Subramania Chettiar and others. *Respondents (Respondents Pltf. and Defts. No. 1 & 2).*

Seshappier v. Subramania Chettiar.

Limitation Act, Art. 48—Agent for sale in possession of jewel—Pledging—applicability of—Pawnee in good faith from—Contract Act, S. 178—*Right to be paid the amount of the pledge.*

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* L. P. A. 217 of 1914. 29th February, 1916.

1. (1877) I. L. R. 2. B. 293.

Seshappier v. Subramania Chettiar.

On 19-5-07 plaintiff entrusted a jewel to one K who undertook to sell it on commission. The latter instead of selling the jewel pledged it with the defendant on 20-5-07. On 15-12-09 plaintiff came to know of this and in 1911, sued to recover the jewel or its value from the defendant.

Held that Art. 48 of the Limitation Act applied to the case and time began to run only from 15-12-09 when plaintiff came to know that the jewel was in defendant's possession.

Held further, that the defendant being a pawnee in good faith from a person lawfully in possession of it was entitled to be paid the amount of the pledge under S. 178 of the Indian Contract Act.

Appeal under Clause 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Seshagiri Aiyar dated the 13th day of February 1914 in C.R.P. No. 122 of 1912, for revision of the decree of the Court of the Subordinate Judge of Negapatam in S.C.S. No. 1023 of 1911.

K. S. Jayarama Aiyar, for the Appellant.

T. V. Gopalasami Mudaliar, for the Respondent.

The Court delivered the following

Judgment:—This is a Letters Patent Appeal against the judgment of Mr. Justice Seshagiri Aiyar in Civil Revision Petition No. 122 of 1912.

The material facts are as follows:—

On 19th May 1907 the 1st respondent entrusted a jewel to one Kolandaisami Pathar (the husband of the 2nd respondent and the father of the 3rd respondent) who undertook to sell it on commission. Kolandaisami pledged the jewel with the appellant who is a money lender for Rs. 175 on 20th May 1907. Kolandaisami died 2 or 3 months afterwards without having redeemed the pledge. On 15th December 1909 the appellant took the jewel to the 1st respondent's shop, and asked him to sell it for him. The 1st respondent then came to know that the jewel had been improperly pledged and demanded its return. The appellant having refused to return it, the 1st respondent brought a Small Cause suit on 29th June 1911 for the return of the jewel or its value Rs. 400 and in answer to the suit, the appellant contended that he acted in good faith in advancing money on the pledge of the jewel, and that he was entitled to recover from the plaintiff the amount Rs. 175 which he had advanced with interest. He further pleaded that the suit was barred by limitation. The Subordinate Judge gave the 1st respondent a decree against the appellant for the return of the jewel or its value.

Seshappier v. Subramania Chettiar.

The appellant filed a Civil Revision Petition which was dismissed.

Two questions were argued before Mr. Justice Seshagiri Aiyar—

1. Whether the suit was barred by limitation.

2. Whether the appellant had a right to be paid back the money Rs. 175 which he had advanced before he could be called upon to deliver up the jewel.

The learned Judge agreeing with the Subordinate Judge held that the article applicable was Article 48, Schedule 1 of the Limitation Act, and not Article 49, and that the suit having been brought within three years from the time (15th December 1909) when 1st respondent learnt that the jewel was in the Appellant's possession was not barred by limitation.

We are of opinion that the learned Judge's decision on the question of limitation was right.

It is clear that the case was one of "conversion." The undertaking which Kolandaisami gave to sell the jewel on commission was not an unlawful one, and the property was not wrongfully taken from the owner's possession. It was only on 20th May 1907 when Kolandaisami treated the property as his own, and pledged it with the appellant that he wrongfully converted it to his own use. The decisions in *Ramesshar Chaubey* v. *Mata Bhikh* [1] and *Ram Lal* v. *Ghulam Hussain* [2] go to show that where specific movable property which was originally obtained lawfully is wrongfully detained, the proper Article applicable is Article 48. See also *Nand Lal Thakeray* v. *The Bank of Bombay* [3], *Nandlal Thokersey* v. *Bank of Bombay* [4].

It remains to consider the more difficult question whether the appellant can claim to be paid back the money for which the jewel was pledged with him before he is required to deliver it to the owner.

Mr. Jayarama Aiyar for the appellant relies on S. 178 of the Indian Contract Act. Three things are required by that section, *viz.*, (1) possession on the part of the pawnor (2) good faith on the part of the pawnee and (3) lawful acquisition on the part of the pawnor.

It is clear we think that the appellant acted in good faith when he advanced Rs. 175 on the pledge of the jewel, and that

1. (1883) I. L. R. 5 A. 341. 2. (1907) I. L. R. 29 A. 579.
3. (1909) 11 Bom. L. R. 926. 4. (1910) 12 Bom. L. R. 316.

Seshappier v. Subramania Chettiar.

he had no reason to suppose that the pawnor was acting improperly when he pledged the jewel. His conduct in taking the jewel to the 1st respondent and asking him to sell it indicates his *bona fides*. The second proviso to the section also does not apply as the article pledged had not been obtained from the lawful owner by means of "an offence or fraud". It has been held that to create a valid pledge under S. 178 of the Indian Contract Act, the pledgor must be in "juridical" possession of the goods as distinguished from mere custody, so a servant entrusted by his master with the custody of the goods during his absence, or a wife in charge of her husband's articles of jewellery as custodian on his behalf cannot make a valid pledge under the section. See *Greenwood* v. *Holquette* [1], *Biddomoye Dabee Dabee* v. *Sittaram* [2] and *Seager* v. *Hukma* [3].

The learned Judge observes that he was "satisfied that the statement in the plaint that Kolandaisami was given the jewel only for the purpose of showing it to intending purchasers had been established, and that the sale price was to be settled in the presence of the plaintiff." With all deference to the learned Judge we do not think that there is any legal evidence to justify his finding.

In paragraph 1 of the plaint it is no doubt stated that Kolandaisami received the jewel saying "that he would show it and bring it back, and that if the purchaser liked the jewel he would settle the price in the presence of the plaintiff."

The evidence of the 1st respondent does not, however, bear out this statement. In his evidence he says, "Kolandaisami used to sell jewels. I gave him the jewel to be sold Kolandaisami did not say how soon he would sell the jewel. He did not say with whom he had left the jewel. His commission was 6¼ per cent." The 1st respondent says nothing in his evidence about the jewel being taken to be shown to intending purchasers, or the price settled in his presence. There is the following significant entry in the 1st respondent's account book under date 19th May 1907, "Debit to Kolandaisami Pathar: To self one pair of Thodu set with English diamonds, Rs. 400".

1. (1873) 12 Ben. L. R. 42. 2. (1878) I. L. R. 4 C. 497.
3. (1900) I. L. R. 24 B. 458.

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We think that the evidence leads only to one conclusion, namely, that Kolandaisami was an agent for the sale of the jewel, and that the arrangement was that he was to sell the jewel which was valued by the owner at Rs. 400 and receive his commission.

In *Greenwood* v. *Holquette*,[1] Couch, C.J. held that the possession meant by S. 178 of the Indian Contract Act was "that kind of possession which a factor or agent has" and this view was accepted in *Le Geyt* v. *Harvey*. [2] We agree with the observations of Bachelor J. in *Nand Lal Thakersey* v. *The Bank of Bombay* [3] that S. 178 and Exception 1 to S. 108 of the Contract Act deal with cases where the pledgor has other than a limited interest and has lawful juridical possession " unconnected with and independent of any interest therein " that is, such juridical possession as a factor or agent has, in other words such possession as is had by an agent entrusted as such, and ordinarily having as such agent a power of sale or pledge. Reference may also be made to the judgment of Mr. Justice Subramania Aiyar in *Naganada Davay* v. *Bappu Chettiar* [4] where the learned Judge points out the distinction between S. 178 and S. 179. In the present case we think that Kolandaisami who was entrusted with the jewel as an agent for sale had such " possession " as is contemplated by S. 178 of the Contract Act, and that the appellant being a pawnee acting in good faith is entitled to the protection afforded by the section.

We accordingly hold that the appellant is entitled to be paid Rs.175 and interest due till date of suit as claimed by him before he can be required to return the jewel. We therefore allow the appeal. The decree of the Subordinate Judge will be modified accordingly. 1st respondent must pay appellant's costs in all Courts. Two months' time from the receipt of records by the Subordinate Judge is granted to the plaintiff to pay up the amount due to the appellant for redeeming the jewels.

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1. (1873) 12 Beng. L. R. 42.
2. (1884) I. L. R. 8 B 501.
3. (1910) 12 Bom. L. R. 316 at 335.
4. (1903) I. L. R. 27 M. 424 at 426=14 M. L. J. 69.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

Soundararajan, minor by next friend Krishna Pillai *alias* Krishnaswami Pillai. ... *Appellant* * (*Plaintiff*)

v.

Saravana Pillai and others ... *Respondents* (*Defendants*).

Soundararajan v. Saravana Pillai.

Hindu Law—Alienation by father of entire family property—One son in existence—Subsequently born son—Right of—Division in status—Limitation Act Art. 126-Suit more than 3 years from date of plaintiff's brother's majority—Barred.

In 1885, Plaintiff's father sold away the whole of his family property to one S. S. brought O. S. 21 of 1887 for possession of the property sold. A razinama decree was passed that on payment of a certain amount within a certain time, S should give up his claims to the property but that in default of payment, possession should be delivered to him. Plaintiff's father failed to make the payment and S. got possession in 1899. In 1906, Plaintiff's brother who was in his mother's womb in 1885, at the date of the sale brought a suit to set aside the sale and got his third share. The present suit was brought in 1910 by the Plaintiff who was born in 1901, to get his share in the property.

Held (i) That the entire family property having been sold, in 1885 there was no property left in which the plaintiff could take an interest by birth.

(ii) That Art. 126 applied to the claim and more than three years having elapsed since plaintiff's brother attained majority, the suit was barred.

Per *Sadasiva Aiyar J.*:—(Moore J. contra.) By the alienation in 1885, Plaintiff's father became divided in status from his son and the family was no longer joint family.

Assuming that plaintiff had a claim, it could not extend to more than a sixth.

Appeal under Cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Ayling in S. A. No. 1191 of 1914, preferred against the decree of the Court of the Subordinate Judge of Mayavaram in A. S. No. 434 of 1912 (O. S. No. 249 of 1910 on the file of the Court of the District Munsif of Shiyali).

T. R. Venkatarama Sastri for the Appellant.

T. Narasimha Aiyangar for Respondents.

The court delivered the following

Sadasiva Aiyar, J.

Judgments:—*Sadasiva Aiyar, J.*—This is a Letters Patent Appeal against the judgment of Ayling, J. who dismissed Second Appeal No. 1191 of 1914 filed by the plaintiff in a suit brought by him for recovery of 2/3rd share in certain properties, the remaining ⅓rd share having already been recovered by the plaintiff's elder brother in suit No. 241 of 1906.

* L. P. A. No. 90 of 1915. 6th March 1916.

Soundararajan v. Saravana Pillai.

Sadasiva Aiyar, J.

The facts are a little complicated but the material ones might be shortly stated thus:—

(a) The plaintiff's father sold away all his then remaining properties to one Sawmi Aiyangar for Rs. 4,000/- under a sale-deed dated February 1885.

(b) Sawmi Aiyangar brought O. S. No. 221 of 1887 for possession of the properties so sold. Razinamah decree was passed that on payment of a certain amount within a certain date, Sawmi Aiyangar should give up his claims over the lands. But if the plaintiff's father failed to make the payment Sawmi Aiyangar was to get possession of the properties through the Court, his purchase being upheld. Plaintiff's father failed to make the payment and so Sawmi Aiyangar got possession in 1899.

(c) In 1906 the plaintiff's elder brother (who was in his mother's womb in 1885, the date of the sale by the plaintiff's father) brought the suit No. 241 of 1906 making the plaintiff and the plaintiff's father and the purchasers from Sawmi Aiyangar parties to the suit. The plaintiff's brother ultimately succeeded in getting his alleged ⅓rd share decreed to him on payment of ⅓rd of the amount of Rs. 3,706 to which extent the consideration for the sale deed to Sawmi Aiyangar was held binding on the entirety of the properties sold. The second appeal to the High Court in the plaintiff's brother's suit was decided on the 4th February 1910.

(d) The present suit was brought very soon afterwards by the plaintiff who was born on the 20th December 1901. I must add here that the plaintiff's father died in 1908 during the pendency of the appeal in the plaintiff's brother's suit of 1906.

The above being the facts, the questions for decision are, (1) Was the compromise decree in O. S. No. 221 of 1887 obtained by fraud and collusion as alleged in the plaint? (2) The plaintiff not having been in existence in the year 1885 when the plaintiff's father sold the plaint property to Sawmi Aiyangar or in 1887 when the decree was passed in Sawmi Aiyangar's favour or in 1889 when Sawmi Aiyangar got possession under the Razinamah decree in 1887, is the plaintiff entitled to question the said alienation? (3) Is the suit barred by limitation? (4) What share is the plaintiff entitled to recover and on what terms, if the other questions are decided in his favour?

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Sadasiva Aiyar, J.

I might at once state on the 4th question that as the plaintiff's father was entitled to $\frac{1}{2}$ share on the date of the alienation (the plaintiff's elder brother who was in his mother's womb being then entitled to the other $\frac{1}{2}$ share) and as the alienation is binding on the plaintiff's father's $\frac{1}{2}$ share under the Full Bench decision in *Chinnu Pillai* v. *Kalimuthu Chetti* [1], the plaintiff's elder brother in the suit of 1906 could have sued for the recovery of the other half share either on his own account or on behalf of himself and his younger brother, the plaintiff. But he chose to sue only for $\frac{1}{3}$rd as belonging to himself and he has succeeded in getting a decree for that $\frac{1}{3}$rd share in that suit to which the plaintiff was a party. So there remains only $\frac{1}{6}$th share available to the plaintiff. The present suit for $\frac{2}{3}$rd share is therefore clearly an exaggerated claim. Even as regards the $\frac{1}{6}$th share, if he is entitled to recover it at all he can recover it only on payment of $\frac{1}{6}$th of the Rs. 3,000 odd which was found in the former suit (to which he was a party) to be binding on the entire properties.

The question relating to the alleged fraudulent and collusive nature of the compromise decree in O. S. No. 221 of 1887 was not decided by the Lower Appellate Court and if the plaintiff succeeds on the other two questions the case will have to go back to that Court for a decision on that question.

As regards the second question, the plaintiff who was born in 1901 had no interest whatever in the properties when they were alienated in 1885 by his father. It is therefore *prima facie* a startling proposition to be told that he has a cause of action to set aside an alienation which took place 16 years before he was born and when he had no interest in the properties. But Mr. Venkatarama Sastriar relied upon the observations found in the Privy Council Case in *Ramkishore Kedarnath* v. *Jainarayan Ram Rachhpal* [2], and the judgment of the present learned Chief Justice sitting on the Original Side reported in *Ganesh Rao* v. *Tulja Ram Rao* [3]. In *Ramkishore Kedarnath* v. *Jainarayan Ram Rachhpal* [1], the following passage occurs at page 980. "On appeal to the Court of the Judicial Commissioner the learned Additional Commissioner held that as the 1st plaintiff had instituted the suit within three years of attaining the age of 21,

1. (1910) I. L. R. 35 Mad. 47, s. c. 21 M. L. J. 246.
2. (1913) I. L. R. 40 Cal. 966; 25 M. L. J. 512.
3. (1913) 26 M. L. J. 460.

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Sadasiva Aiyar, J.

he was entitled" (the suit having been brought to set aside an alleged alienation without consideration made by the father) "to the benefit of S. 7 of the Limitation Act, and the suit was not barred as against him but he held that it was barred as against his younger brothers, who were born after the commencement of the adverse possession of the defendant Jainarayan. *It was, however, conceded before this Board, and as their Lordships think rightly conceded*, that if the 1st plaintiff succeeds in the suit, his younger brothers born *before a partition of the estate* will be entitled to share in the relief." Now, in that case, when the suit was brought the plaintiffs (if I have understood the facts aright) were members of a Joint Hindu Family owning and possessed of properties other than those alienated—by their father. In the present case, the father had no other property in 1885 except the property alienated to Sawmi Aiyangar and he is not alleged to have acquired any other property afterwards. His half share having vested in Sawmi Aiyangar, he and his elder son never formed a Joint Hindu Family *as there was no property to be held jointly*. When the plaintiff was born in 1901, then also there was no joint property and hence no Joint Hindu Family. It seems to me therefore that the reasoning of their Lordships' decision in *Ramkishore Kedarnath* v. *Jainarayan Ram Rachhpal* 1 does not apply to the facts of this case. If I am wrong in the above view, then it can only be on the ground that though the plaintiff's brother alone was entitled to the remaining half-share till the plaintiff was born, the plaintiff by his birth got an interest in that half share which till then belonged to the plaintiff's brother alone. That is, we must take it that though under the Mitakshara Hindu Law, the plaintiff gets by birth a right only in the ancestral property, and the property belonging solely to the elder brother cannot be called ancestral property in his hands when a question arises between him and his younger brother, plaintiff somehow obtained a right by birth to share in that property also. Speaking for myself, I am against any such extension of the (in my opinion unprogressive and unshastraic) *mediæval* doctrine of right by birth.

In *Ganesh Rao* v. *Tulja Ram Rao* 2, it was no doubt held that after-born sons are entitled to share with sons born before

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1. (1913) I. L. R. 40 C. 966 : 25 M. L. J. 512. 2. (1913) 26 M. L. J. 460.

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the alienation but in that case also it did not appear that the father and the prior born sons were not possessed of other family properties which remained as joint family properties, owned by the father and the prior born sons when a son was born subsequent to the alienation in dispute.

I am further of opinion that when the father and the elder son held no property in common after the father had alienated the whole of his interest in the Joint Family property, they became divided members. In *Soundararajam* v. *Arunachellam Chetty* [1] I have respectfully dissented from the observations found in *Ganesh Row* v. *Tulja Ram Rao*, [2] and *Maharaja of Bobbili* v. *Venkataramanujulu Naidu*, [3] which held that a division into shares of the alienated properties does not take place on the alienation, of his share by a co-parcener. At least, in the case where he sells away his share in all the *co-parcenary properties* without exception, I am clear that a division in status takes place and he ceases to be a member of the Joint Hindu Family and if there is only one other co-parcener at the time of the alienation the joint family ceases to exist. If, as was recently held, by a Full Bench of this Court in *Soundararajam* v. *Arunachellam Chetty* [4] an unequivocally expressed intention to create a divided status effects division, the alienation of his interest by a co-parcener in all the joint family property in favour of a stranger seems to me, to be almost conclusive evidence of such an intention to break himself off from the joint status completely.

Further, the plaintiff's brother when he brought his suit for his alleged 1/3 share did not seek to set aside the alienation of 1885, in respect of the plaintiff's share whatever it may have been. As I said before, the only arguable position is (and even that position is in my opinion untenable) that the plaintiff's brother could have sued for the setting aside of the alienation of the half-share other than the father's half-share on behalf of himself and of the plaintiff. If he had done so and if the arguable position was also tenable, the alienation would have been set aside as regards half the property for the benefit of the plaintiff's brother and the plaintiff, and the plaintiff would have been entitled to an one-fourth share. But as the plaintiff's brother sued for recovery of his alleged one-third share in his own individual

1. (1915) 29 M. L. J. 830.
2. (1913) 26 M. L. J. 460.
3. (1914) 27 M. L. J. 409.
4. (1915) 29 M. L. J. 816.

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interest, that suit cannot be said to have been brought in the interests of the plaintiff and it cannot be held that the alienation was set aside in that former suit of 1906 as regards the interests of the plaintiff also in the plaint properties. The plaintiff therefore was bound in his own suit (that is, the present suit) by the terms of Art. 126 of the Limitation Act which gives a period of 12 years, from the date when the alienee takes possession of the property, for a suit by a Hindu son to set aside his father's alienation. As the plaintiff's brother could have brought such a suit as regards the plaintiff's share also (assuming that plaintiff had a share) and did not do so, the plaintiff is now barred more than three years having elapsed from the date of the plaintiff's brother's attainment of majority when this suit was brought. See the Full Bench decision in *Doraisami Serumadan* v. *Nondisami Saluvan* [1].

Mr. Venktarama Sastriar's arguments strenuously and (as usual) ably advanced, involved two propositions: (a) that the plaintiff's brother's cause of action to set aside the father's alienation (in respect of a half-share) which accrued on the date of alienation in 1885 became vested in the plaintiff jointly with the plaintiffs brother as soon as the plaintiff was born even in 1901; (or, perhaps conceived in 1900 or 1901); (b) that when the plaintiff's brother sued for his one-third share, the plaintiff got an independent cause of action for suing to set aside the alienation as regards the remaining one-sixth share and hence the plaintiff has got three years after he himself attains majority to bring a suit to set aside the alienation of that one sixth-share. I am unable to agree to either proposition and if either is negatived the plaintiff's suit fails. I would therefore dismiss the Letters Patent Appeal with costs.

Moore, J:—I agree.

Moore, J.

The facts are fully stated in my learned brother's judgment which I have had the advantage of reading.

The suit was brought in 1910 by the appellant, a minor, for a declaration that a sale made by his father in February 1885 was invalid, and for the recovery of such share of the properties as he might be found entitled to. The alienee took possession of the property in 1889. The appellant was born in December 1901, *i. e.*, sixteen years after the property was sold by his father

1. (1913) I. L. R 38 M. 118 s. c. 25 M. L. J. 405.

Soundararajan v. Saravana Pillai.

Moore, J.

and more than twelve years from the date when the alienee too possession. The respondents are subsequent alienees who have purchased the properties.

Mr. Justice Ayling held that the suit must be treated as falling under Art. 126 of the Limitation Act. In my opinion the learned Judge was right. In the case of suits governed by Art. 126 the plaintiff's cause of action is the taking possession by the defendant of what was the son's joint share of the property. *Prima facie,* therefore, the suit was clearly barred by limitation. In order to entitle the appellant to succeed, it is necessary for him to set aside the alienation which stands in the way of his recovering his share of the property. It was not contended before us that any article other than Art. 126 was applicable.

In support of his argument that the appellant, a subsequently born son, is entitled to sue to set aside the alienation made by his father, Mr. Venkatarama Sastri relied on the following passage in Mayne's Hindu Law 8th Edn. at pages 460 and 461. "If the alienation was made by the father without necessity, and without the consent of sons then living, it would not only be invalid against them, but also against any son born before they had ratified the transaction; and no consent given by them after his birth would render it binding upon him;" and he cited the decisions reported in *Ganesh Row* v. *Tulja Ram Row* [1], *Tulsiram* v. *Babu,* [2] and *Ramkishore Kedarnath* v. *Jainarayan Ram Rachhpal* [3].

None of these decisions are, I think, in point.

In *Ganesh Row* v. *Tulja Ram Row* [1], the question for decision was "Where a father and son constitute a joint family and a father alienates to a third party his share in a certain portion of the joint family property, and subsequently to the alienation but before partition of the joint family property, another son is born to the father, is such son entitled by birth to share to any, and if so, what extent in the unalienated moiety which did not pass to the alienee by virtue of the alienation, or is the eldest son entitled to the whole unalienated moiety to the exclusion of his younger brother"?. The learned Chief Justice held that subsequently born sons were entitled to participate in the remaining half of the property which remained joint family property.. .

1. (1913) 26 M. L. J. 460. 2. (1911) I. L. R. 33 A 664.
3. (1913) I. L. R. 40 C. 966. (P. C.)

Soundararajan v. Saravana Pillai. Moore, J.

As pointed out by my learned brother, the property which was alienated by the appellant's father was the only property which the family possessed and it is not alleged that the father subsequently acquired any other property.

Ganesh Row v. *Tulja Ram Row* [1] is distinguishable as the family seems to have possessed other joint family properties.

Tulsi Rau v. *Rabu* [2] merely decided that where an alienation of ancestral property is invalid as having been made without legal necessity by one member of the co-parcenary without the consent of the rest, it is open to co-parceners to object to such alienation notwithstanding that they were born subsequently thereto.

In *Ramkishore Kedarnath* v. *Jaianarayan Ramrachpal* [3] the facts shortly were, that the plaintiffs and their father were owners of a joint undivided estate and the father improperly made a disposition of a portion of it. The additional Judicial Commissioner held that the suit which was brought by 1st plaintiff the eldest brother within 3 years of his attaining majority was not barred as against him, but was barred as against his younger brothers who were born after the possession of the defendant became adverse. Their Lordships of the Privy Council observe as to this "It was however conceded before this Board, and as their Lordships think rightly conceded that if the 1st plaintiff succeeds in the suit his younger brother born before a partition of the estate will be entitled to share in the relief". In that case, however, the plaintiff formed a member of a joint family, and possessed joint family properties other than those alienated.

Coming now to the facts of the present case, speaking for myself, it must, I think, be held having regard to the decision in *Nanjaya Mudali* v. *Shanmuga Mudali* [4] and *Maharaja of Bobbili* v. *Venkataramanujulu Naidu* [5], that even after alienating his share the appellant's father continued to be a member of the joint family at the time of the appellant's birth, the family did not however possess any joint family property, the father having alienated his share, and it appears to me that by his birth the appellant did not obtain any interest in the property, there being no joint family property then in existence. (*Bholanath Khettry* v.

1. (1913) 26 M. L. J. 460.
2. (1911) I. L. R. 33 A. 654.
3. (1913) I. L. R. 40 C. 966.
4. (1913) 26 M. L. J. 576.
5. (1914) 27 M. L.J. 409.

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Kartick Kissendas Khettry) [1]. On his birth a son gets an interest in what is left of the ancestral property. If however, I am wrong on this point, I agree with my learned brother that assuming that the appellant's brother Govindasami instead of suing merely for the recovery of his one-third share of the property could have sued for the recovery of the half share inclusive of his minor brother's share, as he did not do so, the appellant's suit was barred by limitation. See *Doraisami Serumadan* v. *Nondisami Saluva* [2].

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Coutts Trotter and Mr. Justice Srinivasa Aiyangar.

G. Sam ... *Appellant* * (*Plaintiff*)

v.

T. Ramalinga Mudaliar and others ... *Respondents* (*Defendants 1 & 3 and 3rd Defendant's L. Rs.*)

G. Sam v. Ramalinga Mudaliar.

Madras Estates Land Act S. 3 sub-sec. 2 Cl. (c) (d)—Jaghir Meaning of—Grant for subsistence by Nawab of Carnatic—Not Jaghir, only inam—Acquisition of Kudivaram—Effect of—"Recognised"—Meaning of.

Held that a grant for subsistence made by the Nawab of Carnatic to a Member of the family, though styled a Jaghir, was only an inam coming within S. 3 Sub. Sec. 2 Cl. (d) of the Estates Land Act.

The origin and nature of Jaghir tenure discussed.

Where before 1843, both the Kudivaram and the Melvaram in an inam village had become vested in the Inamdar and no occupancy right had been acquired since.

Held that an action to evict a tenant of such lands was maintainable in Civil Courts.

Per Srinivasa Aiyangar J.:—Recognition of an inam within the meaning of S. 3 Sub-sec. 2 Cl. (d) implies something more than mere acquiescence something done by the Government, as for instance by acceptance of service, Jodi &c.

Second appeals against the decree of the District Court of Chingleput in A. S. No. 249 of 1913 and 400 of 1913, preferred against the decrees of the Court of the District Munsif of Poonamallee in O. S. No. 562 of 1908 and 476 of 1912.

The Court delivered the following

S. Subramania Aiyar for Appellant.

T. R. Venkatarama Sastriar for Respondent.

Srinivasa Aiyangar, J.

Judgments: *Srinivasa Aiyangar J*:—This is a suit for ejectment filed in the ordinary Civil Court. Defendants plead

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S. A. No. 2037 & 2038 of 1914. 18th February, 16.

1. (1907) I. L. R. 34 C. 372.
2. (1913) I. L. R. 38 M 118: S. C. 25 M. L. J. 405. (F. B.)

G. Sam v. Ramalinga Mudaliar

Srinivasa Aiyangar, J.

that a Civil Court has no jurisdiction as the village of Puliyampattu in which the suit lands lie is an 'unsettled Jagir', within the meaning of cl. (c) of Sub-Sec. 2 of S. 3 of the Estates Land Act, and that the lands are not the 'private lands' of the landholder. The defendants are not mere trespassers. They are said to be tenants from year to year whose tenancy was put an end to, by a notice to quit which expired just before the Estates Land Act came into force. The learned pleader for the appellant scarcely contended that the suit lands were the 'private lands' of the plaintiff, if he was a land-holder. But his main contention was, that the village of Puliyampattu was only an ordinary 'inam' and not an 'unsettled Jagir'. The short question for determination is whether the village of Puliyampattu is an 'unsettled Jagir'. For the determination of the question at issue it is necessary, first of all to know the exact nature of the property, and the terms of the original grant, so far as they are ascertainable. The revenue of this and another village, Numbal, appears to have been granted towards the end of the 18th century by the Nabob of the Carnatic to a lady of his family. The villages were afterwards purchased by the Nabob himself, and were in 1782 assigned by him to an Armenian gentleman, the predecessor-in-title of the plaintiff. (Ex. V). At the time of the grant the villages appear to have been mirasi villages. The mirasi rights were from time to time acquired by the predecessors-in-title of the plaintiff, and long before 1843, they had become the owners of both the Kudivaram and Melvaram in the village of Puliyampattu. It is found by both the Lower Courts that no occupancy right had been acquired before the coming into force of the Estates Land Act either by grant, custom, or prescription by the defendant or any of his predecessors who were let in as tenants for the cultivation of the lands. If of course the lands are 'ryoti' lands in an estate, the defendants may have acquired an occupancy right or may be in a position to acquire it under the Estates Land Act. These villages have not been settled under the Permanent Settlement Regulation, nor have they been confirmed or enfranchised under the Inam rules. If the village is an 'unsettled Jagir' within the meaning of cl. (c) the fact that the Jagirdar has subsequent to the grant, acquired the kudivaram interest in the whole or any portion of the lands in the Jagir, cannot take the village out of the category of an estate, nor can

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by itself convert the ordinary ryoti lands in his Jagir into the private lands of the Jagirdar, (Cf. Ss. 8, 185 and definitions of 'ryoti' and 'private land' in S. 3 of the Madras Estates Land Act:) for in 'private lands' strictly so called there is no division of interest as Melvaram and Kudivaram. It is unnecessary to decide the question (as to which there is some conflict of opinion in this court) whether land which was once 'ryoti' can, except under the proviso to S. 185, be converted into 'private land'; (See *Zamindar of Challapalli* v. *Rajalapati Somayya* [1]); for the contention raised in the first court that the suit lands were private lands was abandoned in the first Court and the learned pleader for the appellant, as I have already said, scarcely argued the point here. His principal contention was that although the plaintiff and his predecessors were called Jagirdars and the suit village termed Jagir, it was really an Inam and was not an 'unsettled' Jagir'. He contended, if I understood him right, that there are three classes of Jagirs, one settled, another unsettled, and a third kind which was neither settled nor unsettled, which is a species of Inam. He says, that all Jagirs which paid or are liable to pay no land revenue to the Government, falls in the third class and its nature, *i. e.*, whether it is an estate or not, can only be determined under clause (*d*) of Sub-Sec. 2 of S. 3 of the Estates Land Act, and such lands cannot fall within clause (*c*). I confess I find some difficulty in understanding this distinction. All lands are liable to pay land revenue unless they are exempted by statute or by any binding engagement between the Government and the land owner. The British Government were not bound to recognise the revenue free grants of the previous Governments, though in practice they did recognise them. (Baden-Powell's Land Revenue in British India, page 54. *Secretary of State for India* v. *Bai Raj Bai* [2]). I do not therefore think that the test formulated by the learned vakil for the appellant affords a correct or satisfactory differentiation between an ordinary Inam and a Jagir for the purpose of the Act.

Jagir is a Mahommadan term and Jagir tenure is described in various places in Baden-Powell's Land Tenures. In Volume I at page 189 he says, "whether the Mahommadan Government consciously imitated the Hindu system of appointing certain chiefs to manage special territories especially frontier and mountain tracts

1. (1914) 27 M. L. J. 718.

2 (1915) L. R. 42 I. A. 229

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I cannot determine; but at a very early stage they adopted the plan of granting to Court favourites, to ministers of state, and to military officers, the right to collect the revenue of a certain area of country, and to take the amount collected either to support their state and dignity, or in the case of military chiefs to equip a body of troops, to be availed for the royal service"; at page 190 he says "a great number of assignments of revenue in this way grew into Landlord Tenures, very much as the "Zamindary" estates did. This was much facilitated by the fact that the grantee was allowed, and indeed expected, in many cases, to conduct the revenue administration in his own way, and of course he had (or assumed) the full right to all unoccupied or waste land in the Jagir". Again at page 257 in which he deals with land revenue administration he says thus: "One other feature of the Moghul system should be mentioned. Just as the Hindus divided the whole country into the royal domains and chief's domains, so the Moghuls apportioned their territory into "Khalsa and Jagir" lands.................. .... The "Jagir" lands were divided into blocks or estates which were made over for life, (the grants became hereditary at a later stage) to certain military commanders, ministers and courtiers, who took the revenue for their own support or that of a military force which they were bound to maintain. Sometimes waste tracts were granted in Jagir, and sometimes outlying and troublesome districts. The Jagirdar managed the whole, increased the cultivation, and applied the revenue to his own support, and to expenses of the administration and the pay of troops." Jagirs unlike Inams were usually for life though in course of time they also became permanent and heritable. An Inam, as its name imports, was a present, or gift either to an individual or for a public purpose, while Jagirs generally implied conditions of service or a reward for service, (Baden-Powell's Land Revenue, page 118). The distinction drawn by that learned writer (Land Revenue, page 116) that an Inam implied grant of land with a remission partial or total of the revenue, while a Jagir was a grant merely of land revenue is not one which is now accepted in this Presidency, as an Inam grant is also presumed to be a grant of land revenue only. At the same time it is difficult if not impossible to frame a definition or even give a description of a Jagir, so as to distinguish it from an ordinary Inam as many jagir grants were mere

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presents to individuals, while many service grants are called Inams. In an appeal from Bombay, the Judicial Committee in discussing the nature of a Jagir tenure (known as Saranjam in the Mahratta country) say that 'Inam' is a term of mere generic significance applicable to a Government grant as a whole, *Raghoji Rao Saheb* v. *Lakshman Rao Saheb* [1]. In fact villages termed Jagirs and Paliams were settled by the Inam Commissioner under the Inam rules. See classification of Inams in the Inam rules, page 181, Vol. 2, Board's Standing Orders, 1907; also Chingleput District Manual, page 356 where two Jagir villages are classed under enfranchised Inams. The three Kaliyarayan Jagirs in the South Arcot District were settled by the Inam Commissioner and are included in the schedule to the Impartible Estates Act.

The word 'Jagir' occurs along with 'unsettled Paliam' in clause (c). There is a definition of an 'Estate' in identical terms in the Proprietary Estates Village Service Act and the Survey and Boundaries Act, and there also the same collocation occurs. Further in giving illustrations of permanently settled estates, a Zamindari, Jagir, Mitta and Paliam are mentioned. The Jagirs whether settled or unsettled which are classed as 'estates' are presumably of the same character as Zamindaries, Paliams and the like, *i.e.*, they are proprietary Estates or as more correctly described by Baden-Powell as "Zemindar or Landlord Tenure over Estates." It will be seen from the description given above of the origin and nature of Jagir grants and the Revenue policy which dictated them, that the Jagirdar was in a large number of cases exercising control over the tract assigned to him and was administering the same; he in fact was exercising governmental functions in subordination, it may be to a superior, and was holding his jagir on condition of military or political service. There were cases however of jagir grants where the land revenue was assigned merely for private enjoyment as for instance, subsistence, and these cases are now indistinguishable from ordinary Inam grant; and as regards these, I think, the principle applicable to Inams ought to be applied in determining the character, as estates, for the purpose of the Estates Land Act. It is only the first class of Jagir grants that came subsequently to be classed along with ordinary Zemindaries or Paliams, and I think it is to such estates that clause (c) applies.

1. (1912) I. L. R. 36 B. 639, P. C.

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In fact, it is said, 'that a jagir differs from a zemindari in that the revenue or Peshkush payable by the latter was fixed at some proportion of the receipts about the time of the settlement, while a Jagirdar pays merely a lump sum not expressly calculated on such a basis. In the case of the Jagir of Arni this payment was called a "nuzzur" or gift. See North Arcot District Manual, Vol. 1, 2nd Edn. (1895) page 281.

It is clear in this case that the original grant was only a personal grant for subsistence and in no way differed from an ordinary Inam, it may be an estate, if it comes under the class described in clause (d) but is not an unsettled jagir within the meaning of clause (c). I may mention that in one of the earliest documents on the record the plaint village is described as an Inam village, Exhibit B. In the Chingleput Manual it is apparently classified under the heading of 'unenfranchised Inams' though described as a Jagir. If, therefore, the villages of Numbal and Puliampattu do not form an unsettled Jagir, within the meaning of clause (c), it is immateiral to determine whether they fall under clause (d), for if they do, so far as the suit lands are concerned they ceased to form part of an estate by virtue of the exception to S 8. As I have already said, the land revenue alone was given as Inam to a person not then the Kudivaramdar. The villages however have never been confirmed or enfranchised by the British Government. It is difficult to assign a precise meaning to the word 'recognised'; whether mere acquiescence is enough or whether something more is required is not clear. I should be inclined to think that recognition implies something more than mere acquiescence, something done by the Government, as for instance by acceptance of service, jodi, etc, *Secretary of State for India* v. *Bhanamurthy* [1]. In form the title-deeds issued by the Inam Commissioner only recognise the title of the grantee, but the word 'recognise' in the Act is not used in that sense is clear, for no title-deed is issued till after confirmation or enfranchisement. The word enfranchise is not to be found in cl. (d), but as before enfranchisement, the Inam is in a sense confirmed, the word 'confirmed' was probably used to cover cases also of enfranchisement after proof of title.

The question whether ordinary Civil Courts have jurisdiction, even if the suit lands were lands in an estate was not raised or

1. (1913) 24 M. L. J. 538.

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argued. An answer to this question would depend on the precise effect of the exception contained in S. 153 taken along with S. 157. See *Ponnusamy Padayachi* v. *Karuppudayan* [1]. I therefore think that the appeal must be allowed and the decree of the Munsif restored with costs here and in the Court below.

Second appeal No. 2038 of 1914 will follow.

Coutts Trotter, J.

Coutts Trotter, J:—The sole question raised before us in this case is as to the jurisdiction of the Civil Courts and the matter arises in this way. The defendants were tenants under the plaintiff and received from him a notice to quit which expired before the Estates Land Act came into force, and on the strength of that notice the plaintiff sued them in ejectment. If the lands in question formed an unsettled Jagir within the meaning of S. 3 of the Madras Estates Land Act, it is admitted that the Civil Court has no jurisdiction. The lands in question were granted by the Nabob of the Carnatic somewhere in the middle of the eighteenth century to a lady of his family for her subsistence. They afterwards reverted to the Nabob, but at a date when he had ceased to be a Ruling Prince of the district. In 1782 he assigned them apparently by way of mortgage to a predecessor in title of the plaintiff. It is not disputed that the plaintiff and his predecessor in title have been in possession ever since, and that for a very long time, probably nearly a century, they have been the owners both of the kudivaram and of the melvaram rights. The plaintiff and his predecessors in title have regularly described themselves as Jagirdars, and the term Jagir has frequently been applied to the suit lands, though they have also been mentioned in official documents under the description of inam. 'Inam' is the more generic term and probably all Jagirs are a species of Inam, though there are many kinds of Inam that are not Jagirs. The subject is one with which I am unfamiliar and speak with extreme diffidence, but I have come to the conclusion that these lands though so described are not Jagirs within the meaning of the Estates Land Act but are merely an ordinary Inam. I am assuming that what has to be looked at is the character imposed upon the land at the time of the original grant by the Nabob as Nabob to the lady; for his resumptoin and subsequent re-grant later on were not made at a time when he was Sovereign authority and could impose a

1 (1914) I. L. R. 38 M. 843, s.c. 26 M. L. J. 285.

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tenure of a new character. The gift was made to the lady for her subsistence as a private person. We have been referred to works of learned writers on land tenures, such as Baden-Powell's Land systems in British India and Maclean's Manual of Administration of the Madras Presidency and from their perusal I am lead to the conclusion that in its origin a Jagir was connected with some special public service such as the maintenance of troops and the like, or at least, if no such condition was imposed, was a reward for some service to the State conferred upon some State Official in recognition of his position. I do not think that the mere use of the term Jagir concludes the matter. The term Jagirdhar is one of some dignity likely to be usurped by the holders of lands which by the original grant were not conferred as Jagirs but as ordinary inams. If these lands, therefore, as I hold, are not Jagir lands they are not 'unsettled Jagir' within the meaning of S. 3 of the Estates Land Act. As inams they fall within the exception to S. 8, since the kudivaram and melvaram rights are both vested in the same person. I am, therefore, of opinion that the Act does not apply to these lands and that the Ordinary Courts of law have jurisdiction over the suit.

The appeal must be allowed and the decree of the District Munsif restored with costs here and below.

Second appeal No. 2038 of 1914 will follow.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

Subbai Goundan ... *Appellant* (Plaintiff)*

v.

Palani Goundan and another ... *Respondents (Defendants.)*

Subbai Goundan v. Palani Goundan.

*Mortgage—Transfer of Property Act, S. 83, 84—Deposit—Payment of batta for proper address—Interest stops with—*Bona fide *mistake in amount—No mesne profits—Interest for the day of deposit.*

When the mortgagor pays the amount due upon the mortgage into court and pays batta for notice with the proper address of the mortgagee, he has done all that has to be done by him and thereafter interest ceases to run.

Where there are conflicting rights as between subject and subject, fraction of a day will be treated as a whole day and the mortgagor is bound to pay interest for the day on which he makes deposit.

Where the money deposited under S. 83 was short by 9 pies owing to a *bona fide* mistake on the part of the mortgagor.

Held that he was not entitled to mesne profits as his tender was insufficient.

* S. A. No. 2388 of 1914. 24th March 1916.

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Second appeal against the decree of the Court of the Temporary Subordinate Judge of Coimbatore in A. S. No. 7 of 1914 preferred against the decree of the Court of the District Munsif of Udumalpet in O. S. No. 1726 of 1912.

V. Purushothama Aiyar, for Appellant.

S. T. Srinivasagopalachari, for Respondent.

The Court delivered the following

Judgment:—The facts which have given rise to this appeal may be shortly stated. The appellant who had obtained a subsequent possessory mortgage from 2nd defendant sued to redeem a prior possessory mortgage Ex. I dated 7th April 1903 for Rs. 1,000, in favour of the 1st defendant (1st respondent). The document provided that the principal amount was payable on 7th April 1910, and "that in default of payment within the prescribed time the amount was repayable with interest at 4 annas per Rs. 100 per mensem from the date of expiry."

On 28th May 1910 the appellant deposited Rs. 1,004-2-0 in Court under S. 83 of the Transfer of Property Act. 1st respondent was served with notice of the deposit but he did not appear and admittedly the money was not drawn from Court: the petition under S. 83 of the Transfer of Property Act was dismissed on 21-6-10.

On 17th September 1912 the appellant instituted the present suit in which he claimed Rs. 600, as mesne profits for two years, (May 1910 to May 1912). 1st respondent contended that the amount deposited was not correct, that he had surrendered the land to appellant, that he was entitled to Rs. 50 for value of improvements and also to interest up to the date of the written statement and that appellant's claim for mesne profits was unsustainable.

The District Munsif held that 1st respondent's plea that he had surrendered the land was untrue and that he was not entitled anything for value of improvements.

At the same time he disallowed the appellant's claim for mesne profits and allowed 1st defendant's claim for interest on the ground that the amount deposited was incorrect, and directed each party to bear his own costs in the suit. On appeal, the Subordinate Judge confirmed the District Munsif's decision. The Lower Court found that the amount deposited was incorrect and fell short of the amount due by 2 annas, the appellant having by mistake calculated interest for 50 days instead of for 51. In

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second appeal, it is contended *inter alia* that the Lower Court should have held that interest ceased from the date of deposit.

The appellant is not, we think, entitled to raise this contention, Court fee not having been paid on the amount of interest decreed. The valuation of the second appeal has been taken as Rs. 800, the amount of mesne profits for 4 years from 1910 to 1914. The only question, therefore, for determination is whether the appellant is entitled to claim mesne profits and whether there was a proper deposit of what was due under the mortgage.

S. 84 of the Transfer of Property Act provides, that "when the mortgagor or such other person as aforesaid has deposited in Court the amount remaining due on the mortgage, interest on the principal money shall cease............... as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of court." The section provides that the interest on the principal money shall cease from the date of the deposit of the "amount remaining due on the mortgage".

In *Deo Dut* v. *Ram Autar*, [1] the opinion was expressed that, where the mortgagor deposits an amount which falls short of the amount actually due, presumably interest would not cease, even *pro tanto*. On the other hand in *Haji Abdul Rahman* v. *Haji Noor Mahmad*. [2] Telang J., held that the rule laid down in *Dixon* v. *Clerk* [3] that the tender of only a part of the debt must be treated as if it had never been made, applies only where the party making the tender admits more to be due than is tendered.

It may be doubted whether the view taken by the learned Judge is supported by the language of S. 84 of the Transfer of Property Act. On the wording of the mortgage document Ex. I, the principal amount was repayable on 7th April 1910 and interest was payable from the date of expiry (presumably 7th April) excluding that date. In the absence of mercantile custom or usage, interest cannot be charged for either the day the money was advanced or on which it was repaid. See *Raghub Prusti* v. *Bhobui Sahoo* [4].

The appellant appears to have made a *bona fide* mistake in calculating the number of days for which interest was payable. Interest was payable clearly from and including 8th April 1910 up

1. (1886) I. L. R. 8 A. 502 at 508.
2. (1890) I. L. R. 16 B. 141.
3. (1847) 5 C. B. 365. S. C. 16 L. J. C P 237.
4. (1908) 8 C. W. N. 216.

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to the date of deposit *i.e.*, 28th May 1910. In other words, interest was payable for 23 days in April and 28 days in May. The appellant seems to have thought that interest was not payable for the 28th day of May, which was the date of deposit. For 23 days in April the interest came to Rs. 1-14-8 and for 28 days in May, it amounted to Rs. 2-4-1 17/31. Interest for 27 days only was Rs. 2-2-10 2/31. According to the plaintiff's calculation therefore he had to deposit Rs. 4-1-6 2/31 and he deposited Rs. 4-2-0 (in addition, of course, to the sum of Rs. 1,000.) He evidently thought that he had paid about 6 pies more than what was due. Strictly speaking he had to pay Rs. 4-2-9 17/31 that is, 9 $\frac{17}{31}$ pies more than he paid. (The Lower Court's view that the deposit fell short of 2 annas seems to be based on a wrong calculation). That the plaintiff had to pay the interest for the 28th May also seems to be clear from the maxim "*Fractionam deci non receipt lex.*" Where there are conflicting rights as between subject and subject a fraction of a day will be treated as a whole day; as for instance, in a claim for demurrage of a ship, in which case it was expressly held that a fraction of a day counts for a day, *Commercial Steam Ship Co.*, v. *Boulton* [1]. A creditor cannot also be required in reason to seek another investment for his money on the very day it is paid up. We regret that we are constrained to hold that the deposit made by the plaintiff, having fallen short of the sum due by 9½ pies, was not a proper deposit, though we are unable to agree with the learned Subordinate Judge that the deposit should have included the interest till the date on which the defendant got notice of the deposit through Court. S. 84 requires the mortgagor only to do all that has to be done by him to enable the mortgagee to take such amount out of Court and when he pays batta for notice with the proper address of the mortgagee he has done all that has to be done by him. See also *Krishnasami Chettiar* v. *Ramasami Chettiar* [2], where it is said that, if the mortgagor pays the proper amount into Court and causes a notice to be issued upon the mortgagee, there is nothing more that he has got to do under Ss. 83 and 84 of the Transfer of Property Act to stop the running of interest except that he should not afterwards withdraw the money which he deposited in Court.

1. (1875) L. R. 10 Q. B. 346. 2. (1910) I. L. R. 35 M 44.

We are therefore constrained to substantially confirm the decree made by the Lower Courts; but we think the mortgagee's conduct was altogether unreasonable. He dishonestly raised a false plea as to the delivery of the mortgaged property to the plaintiff and his claim to be entitled to the value of alleged improvements was also disallowed. We will therefore modify the Lower Appellate Court's decree by directing the parties to bear their own costs in that Court. With this modification the second appeal will stand dismissed but without costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Moore.

V. G. Anantharama Iyer ... (*Receiver*) *Appellant in C. M. S. A. No. 107 of 1914, Receiver appointed in place of original receiver.*

v.

Vettath Kuttimalu Kovilamma *alias* Nangachi Kovilamma and another. *Respondents in both Respondents.*

Original Receiver—Petitioner.

Insolvency of judgment-debtor—Adjudication—Vesting order—Subsequent sale of judgment-debtor's property in execution of decree obtained before insolvency—Validity—Objection of Official Receiver—Effect—Application to set aside—Order rejecting—Appeal—Revision—Civil Procedure Code, Ss. 100, 115—Provincial Insolvency Act, Ss. 34, 35—Effect—Execution sale—Application to set aside—Order on—Appealability—Civil Procedure Code, S. 47, O. 21 R. 90—Effect.

An executing court is entitled to set aside a sale on an application under S. 47 of the Code and no separate suit will lie for that purpose.

It is only when O. 21 R 90, as well as S. 47, of the code applies to the petition to set aside an auction sale that no second appeal lies under S. 100 of the code. But where S. 47 alone is applicable to the petition, the order passed thereon is a decree and a second appeal lies.

Where, after a judgment-debtor had been adjudged an insolvent and after his property had vested in the Official Receiver, a portion thereof was sold in execution of the decree obtained before the adjudication notwithstanding the objection of the Receiver.

Held, on an application by the latter to set aside the sale.

1. That at the time of the sale the judgment-debtor had no right, title or interest which could be sold or vested in a purchaser;

2. That a purchaser with notice that the judgment-debtor had been declared an insolvent acquired no title under the sale;

3. That the omission on the part of the Official Receiver to give the notice specified by S. 35 of the Provincial Insolvency Act did not affect the case;

4. That the sale was altogether irregular and that the Court in holding the sale after it had been brought to its notice that the judgment-debtor had been adjudged an insolvent acted, if not without jurisdiction at any rate with material

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irregularity in the exercise of its jurisdiction within the meaning of S. 115 of the Code.

5. That the order rejecting the application was a decree and a second appeal lay against it.

Meaning of "purchaser in good faith" in S. 34 Sub-cl. (3) of the Provincial Insolvency Act.

Appeal against the decree of the District Court of S. Malabar in C. M. A. No. 33 of 1912 preferred against the order of the Court of the Subordinate Judge of S. Malabar at Calicut in C. M. P. No. 839 of 1912 in O. S. No. 61 of 1910, and

Petition under S. 115 of Act V of 1908 praying the High Court to revise the said order of the District Court of S. Malabar.

J. L. Rosario for Appellant.

K. P. Govinda Menon for Respondent.

B. Narasimba Rao for Second Respondent.

The Court delivered the following

Judgment:—One Abdul Kadir was adjudged an insolvent on the 17th August 1911. In execution of a decree obtained against Abdul Kadir on the 21st January 1911, certain properties were attached. The Receiver of the Insolvent's estate applied to the Subordinate Judge of Calicut on the 2nd March 1912 to stay the sale on the ground that Abdul Kadir had been declared an insolvent. A fresh sale proclamation was issued and the sale was adjourned to the 15th April 1912 on which date the property was sold subject to a mortgage of Rs. 6,119-3-0 in favour of one Ummar Sahib and purchased by the 2nd respondent. On the 19th April 1912 the Receiver applied to the Court under O. 21 R. 90 of the Code of Civil Procedure to set aside the sale. The Subordinate Judge dismissed the application on the ground, *inter alia*, that the insolvency proceedings in the District Court related to the insolvency of a firm of which the judgment-debtor was a member and that the property sold was not the property of the firm but the exclusive property of Abdul Kadir, that the auction purchaser was a purchaser in good faith, and that neither S. 47; nor O. 21 R. 90 of the Code of Civil Procedure had any application. An appeal to the District Court was dismissed, the District Judge holding that O. 21 R. 90 of the Code of Civil Procedure did not apply as there was no irregularity in publishing or conducting the sale. The District Judge further observed that no application such as

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is contemplated by S. 35 of the Provincial Insolvency Act; had been made by the Receiver.

Mr. Narasimha Rao takes the preliminary objection that no appeal lies even if O. 21 R. 90 of the Code of Civil Procedure under which the application to set aside the sale was made, is applicable: We think that the petition may be taken as having been presented under S 47 of the Code of Civil Procedure also, though that section was not quoted.

Proceedings to set aside sales on the ground of material irregularity or fraud in publishing or conducting the sale involve questions relating to the execution, discharge or satisfaction of a decree and hence fall under both S. 47 and O. 21 R. 90 of the Code of Civil Procedure. Proceedings to set aside auction sales on any other tenable ground also involve questions relating to execution etc. and hence fall under S. 47 of the Code of Civil Procedure though they may not also fall under O. 21 R. 90 of the Code of Civil Procedure. We agree with the opinion of Oldfield, J. In *Muthiah Chettiar* v. *Bava Sahib* [1] that an executing court is entitled to set aside a sale on an application under S. 47 of the Code of Civil Procedure and that no separate suit will lie. See also *Manasaram* v. *Nagendra Nath* [2] and *Amirchand* v. *Bakshi Harihar Prosad Singh* [3]. It is only where O. 21 R. 90 applies also (besides Section 47) to the petition to set aside the auction sale that no second appeal lies under S. 100, Civil Procedure Code. But when S. 47 of the Code of Civil Procedure alone is applicable to the petition, the order passed thereon is a decree and a second appeal lies.

Moreover, the appellant has also filed a civil revision petition and there can be no doubt that we have the power to interfere in revision, if it is shown that the Lower Courts have acted with material irregularity in the exercise of their jurisdiction.

Mr. Rosario contends (1) that after adjudication no creditor is entitled to proceed against the person or property of the insolvent, and that when it was brought to the notice of the court by the Receiver that the judgment-debtor had been adjudged an insolvent court ought not to have proceeded with the sale; (2) that as a matter of procedure the Receiver in whom the insolvent's estate vested on the making of the adjudication order

1. (1914) 27 M. L. J. 605. 2. (1912) 16 C. L. J. 557.
3. (1915) 30. M. L. J. 238.

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ought to have been made a party to the execution proceedings, and that the sale is bad. Mr. Rosario has referred us by way of analogy to certain cases, *Ramasawmi* v. *Bagirathi*, [1] which was followed in *Krishnayya* v. *Unissa Begum* [2] and *Rayarappan Nambiar* v. *Malikandi Aketh Mayan* [3] where it was held that a sale held without bringing on record the legal representatives of the deceased judgment-debtor is void or a nullity as against the representative of the judgment debtors. We think that the sale was altogether irregular and that the court in holding the sale after it had been brought to its notice that the judgment-debtor had been adjudged an insolvent, acted, if not without jurisdiction, at any rate with material irregularity in the exercise of the jurisdiction of the Court. S. 34 (1) of the Provincial Insolvency Act provides that "where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realised in the course of the execution by sale or otherwise before the date of the order of adjudication." The terms of the section are quite clear and must, we think, be given effect to. In this case both the sale and the realisation of the assets took place after the adjudication order was made. We are also of opinion that the judgment-debtor had at the time of the sale no right, title or interest which could be sold or vested in a purchaser and that, consequently the 2nd respondent acquired no title as to the property which had passed to the Receiver on the adjudication order being made. See *Raghunath Das* v. *Sundar Das* [4].

Mr. Narasimha Rao for the 2nd Respondent relies on sub-clause 3 of S. 34 of the Provincial Insolvency Act which provides that "a person who in good faith purchases the property of a debtor under a sale in execution shall, in all cases acquire a good title to it against the Receiver."

It appears to us that a purchaser in good faith means a person who did not know at the time of the sale that the judgment-debtor was an insolvent, and could not by the exercise of due diligence have discovered that an adjudication order had been made. The sale in this case was stayed at the instance of the Receiver and adjourned for a month and a fresh sale proclamation

1. (1888) I. L. R. 6 M. 180
2. (1891) I.L.R. 15 M. 399.
3. (1914) 26 M. L. J. 267.
4. (1914) I.L.R. 42 Cal. 72 (P. C.)

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was issued. It is difficult to believe that the auction purchaser could have been unaware of the fact that the judgment-debtor whose property was sold had been declared an insolvent. The insolvency of Abdul Kadir must have been a matter of notoriety in Calicut where the property was sold and the purchaser must have been aware of it. Further, it is only the purchaser of the property of the "debtor", who is protected but when the property had vested in the Receiver before the sale it ceased in law to be the property of the debtor and hence S. 34 has no application. S. 35 of the Provincial Insolvency Act to which the District Judge refers must be read with S. 34. S. 35 of the Provincial Insolvency Act relates to the dates of a court executing a decree as to property taken in execution, when notice has been given to the court before the sale that an adjudication order has been made. The omission on the part of the Official Receiver to give such notice does not, we think, affect the case. The sale must accordingly be set aside and the appeal allowed with costs. No separate order in Civil Revision Petition No. 879 of 1914 is necessary.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling and Mr. Justice Napier.

Maharajapuram A. Subramania Aiyar and others ... *Appellants* * (*Plaintiffs*)

v.

Pallasana Gramoni and another ... *Respondents* (*Defendants*)

Civil Procedure Code, O. 8 R. 6—" Equitable set-off"—Scope of doctrine—English and Indian Law—Mortgage—Assignment—Suit by assignee for sale—Right to set-off decree debt due by assignor—Transfer of Property Act, S. 132—Applicability—Effect.

In a suit on a mortgage by an assignee of the mortgage the mortgagor cannot claim to set off debts unconnected with the mortgage owing by the original mortgagee to him.

Where in a suit for sale brought by the assignee of a mortgage the court below allowed a decree debt against the assignor to be set-off against the claim by the assignee, *Held*, even assuming that there could be a set-off of the nature pleaded, such set-off could not be pleaded as an equity attaching to the rights of the assignee.

Held further that the assignment not being an actionable claim within the meaning of S. 132 of the Transfer of Property Act, the set-off could not be pleaded under that section also.

Scope of the doctrine of "Equitable set-off" examined.

English Law reviewed.

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* S. A. No. 1460 of 1914. 9th March 1916.

Subramania Aiyar v. Pallasana Gramoni.

Second Appeal against the decree of the District Court of South Malabar in A. S. No. 704 of 1913 preferred against the decree of the Court of the Principal District Munsif of Calicut in O. S. No. 613 of 1912.

C. V. Ananthakrishna Aiyar for Appellants.

A. S. Venku Aiyar for Respondent.

The Court delivered the following

Napier, J.

Judgments:—*Napier J.*—This is an appeal from a Judgment of the District Judge of Malabar in which he has allowed a decree-debt against an assignor to be set-off against the claim by an assignee of the mortgage in a mortgage suit. It is admitted that the set-off is not one that is covered by O. 8 R. 6 of the Code of Civil Procedure. But it is argued that it is a set-off of an equitable nature and that the Civil Procedure Code not being exhaustive as to rights of set-off it is permissible. There is authority for that proposition in a case reported in *Subramaniya Chettiar* v. *Muthuswami Aiyangar* 1. With the greatest deference to the learned Judges I doubt whether it is advisable to introduce under the name of equity cases which appear to be rather ones of hardship on the facts. The doctrine that there is a right of equitable set-off is well founded, but has always been confined to unascertained sums arising out of the same transaction. To give the words "equitable set-off" a wider meaning than this, appears to me to be very dangerous. But assuming that there could be a set-off of this nature we have to consider whether there is any doctrine under which this equitable set-off can be pleaded as an equity attaching to the rights of the assignee. What seems to be conclusive against this argument is that under the express words of the Transfer of Property Act an assignment of this nature is not an actionable claim within the meaning of S. 132. The principle that transferees of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer is of course well founded on the original nature of the assignment of a chose-in-action under English Law; the principle being that a person cannot ignore his liability on a debt to another person and bring a suit to recover that person's debt to him simply by assigning that debt. Prior to the Judicature

1. (1907) 17 M. L. J. 481.

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Act such a suit could only be brought in the name of the original creditor and the debt due to the defendant in the suit could of of course be set off. But S. 3 of the Transfer of Property Act contains this definition: "Actionable claim" means a claim to any debt other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property." It is argued before us that although under the strict words of the Act this equitable right of set-off could not be pleaded against an assignee of the mortgage, still, there remains available to the defendant a common law doctrine that it can be so set-off and that this doctrine even goes beyond the language of S. 132 and makes the assignee liable not only to the equities at the date of the transfer but any debts due from the assignor to the mortgagor prior to notice having been given of this assignment by the assignee to the mortgagor. The authority relied on in support that proposition was the case of *Norrish* v. *Marshall* [1]. Whatever that case decides, however, the true doctrine is to be found in the language used by the Court of Appeal in *Turner* v. *Smith* [2] where it is said by Mr. Justice Byrne:

"The effect in law of taking a transfer of a mortgage without the privity of the mortgagor has been so recently summed up by Cozens Hardy, J., in the case of *Dixon* v. *Winch* [3] that I cannot do better than adopt his words which are to be found at page 742 of the report; 'It is well-settled that where a mortgage is transferred without the privity of the mortgagor the transferee takes subject to the state of account between the mortgagor and mortgagee at the date of transfer." This doctrine has been accepted by this court reported in *Chinnayya Rawutan* v. *Chidambaram Chetti* [4]. The language is of course very general but I am unable to accept it as laying down that not only the state of account between the mortgagor and the mortgagee with reference to the mortgage is to be taken as against the assignee, but also any independent debt in no way connected with the mortgage which has not been paid but is due from the mortgagee to the debtor. I know of no authority and the learned Vakil has not been able to show any authority for this proposition. The theory that an assignee of a mortgage stood in English law in no better position than the

1. (1821) 5 Maddock 47: 56 Eng. Rep. 977. 2. (1901) 1 Ch. 213 at p. 219.
3. (1900) I. Ch. 742. 4. (1880) I. L.R. 2 M. 212.

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assignee of an ordinary chose-in-action is opposed to the doctrine laid down by the Court of Appeal in the case of *Taylor* v. *The London and County Bank Company* [1]. "Although a mortgage debt is a chose-in-action, yet, where the subject of the security is land, the mortgagee is treated as having 'an interest in land,' and priorities are governed by the rules applicable to interests in land, and not by the rules which apply to interests in personalty." The reason is thus stated by Sir William Grant in *Jones* v. *Gibbons* [2]. "A mortgage consists partly of the estate in the land, partly of the debt. So far as it conveys the estate, the assignment" that is, of the mortgage—"is absolute and complete the moment it is made according to the forms of law. Undoubtedly it is not necessary to give notice to the mortgagor, that the mortgage has been assigned, in order to make it valid and effectual. The estate being absolute at law, the debtor has no means of redeeming it but by paying the money. Therefore he, who has the estate, has in effect the debt as the estate, can never be taken from him except by payment of the debt."

I have heard nothing in the case quoted to us which is at variance with this doctrine which is laid down by the Court of Appeal. It therefore follows that in England it has never been an accepted doctrine that an assignment of a mortgage is covered by the same rules that govern assignments of other choses-in-action. We have been pressed with the decision of the present Chief Justice *Dwarka Doss, Goverdhana Doss* v. *Dhanakoti Ammal* [3] and it is suggested that the reasons given for that decision narrow the rights of an assignee of mortgage to the rights of an assignee of an ordinary chose-in action. I do not think that the learned Judge's reasons bear that interpretation, but if they do, I should have to express my dissent from them in view of the broad language which I have quoted from the decisions of the Court of Appeal. It follows therefore that there is no doctrine under the common law of England which will support the case for the respondent outside the Transfer of Property Act. It is suggested that this set-off can be pleaded as a debt which was in existence at the time of the assignment. This is not the *ratio decidendi* of the lower court and in my opinion it is not open to the respondent

1. (1901) 2 Ch. 231 at 254. 2. (1804) 9 Ves. 407.
3. (1913) 15 M. L. T. 193.

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to argue it here. The Judgment debt which he seeks to set off is undoubtedly one of a later date than the assignment. The original cause of action may have been prior to the assignment but as that original cause of action has merged in the debt, I am clear that he cannot fall back on it and ignore the judgment debt at the same time as he seeks to use the actual debt itself as the basis of the set-off. If he was able to ignore the judgment debt he would have to prove the original liability on which it is based, and that of course he has neither attempted to do nor could do in the suit. It follows therefore that even giving the broadest construction to the language of the decision in *Turner* v. *Smith* [1], he cannot set up this debt as coming within the phrase " state of account in existence at the date of the assignment."

Another objection was taken in the lower court to the maintainability of the set-off, namely one of jurisdiction. But we do not think it necessary to decide that point as we are satisfied that there is no equitable right of set-off known to law which is defence to this mortgage suit.

The appeal must therefore be allowed with costs.

Ayling, J. I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir John Wallis, *Kt.*, Chief Justice and Mr. Justice Phillips.

Ponnamballa Pillai *v.* Muthu Chettiar.

Ponnambala Pillai (died) and another ... *Appellants* * *(Defendants Nos. 2 and 5)*

v.

Muthu Chettiar and others ... *Respondents (1st Plaintiff and Defendants Nos. 6 to 8.)*

Temple Committee—Dismissal of Temple Trustee—Validity—Failure to give opportunity for defence—Effect—Temple—Rent due to—Suit by two out of five trustees, others being made defendants—Suit instituted without consulting defendants—Trustees—Effect—Payment to one of several Trustees—Payment to majority—Validity—Conditions.

The dismissal by a Temple Committee of the trustee of a temple is invalid if the dismissal is made without calling upon the trustee to answer the charges in respect of which he is dismissed.

Where the managing member of the Committee sent proposals to the other members to dismiss the trustee and before he received answers from all the members took upon himself to inform the trustee that he had been dismissed :

Held, that he had no right to proceed in that way.

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* A. S. No. 127 of 1914. 27th January 1916.

1. (1901) 1 Ch. 218.

Ponnamballa Pillai v. Muthu Chettiar.

In a suit to recover rent brought by two out of five trustees of a temple, the other three being added as defendants, *held*,

(1) that the suit was competent notwithstanding that it was instituted without consulting the trustees who were made defendants;

(2) that payment to the defendants-trustees was not valid inasmuch as there were disputes between them and the plaintiff at the time to the knowledge of the tenant and the plaintiff had asked him not to pay to the defendants but pay it to himself.

Circumstances under which payment to one out of many trustees might be valid, considered.

Quære. Whether at a properly convened meeting a majority of the trustees might decide that payment should be made to them in exclusion of the other trustees.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in O. S. No. 63 of 1913.

This was a suit brought by the plaintiffs 1 and 2, as trustees of the Temple of Tirunageswaram, to recover from defendants 1 to 5, the rents due for faslis 1316 to 1318 under a lease granted in favour of the father of defendants 1 and 2. The 6th defendant was impleaded as one of the trustees of the temple and defendants 7 and 8 as they claimed to have been appointed as trustees by the Temple Committee. Defendants 1, 3 and 5 were exonerated as they pleaded that they were divided from the 1st defendant's father and hence not liable. The 2nd defendant, the chief contesting defendant, pleaded that the suit as brought was not maintainable, firstly, because the 1st plaintiff had been dismissed from his trusteeship; secondly, that the other trustees, defendants 6 to 8, had not been consulted before filing the suit. He also contended that he had settled the account due in respect of faslis 1316 and 1317 with the defendants 6 to 8 and paid the amounts and that in respect of faslis 1318, he had surrendered the lease to defendants 6 to 8 who had also accepted the lease. The 2nd plaintiff died pending suit and as no other person was appointed in his place as trustee, it was also contended that the 1st plaintiff having been dismissed from the office of trusteeship the suit could not at all be continued by him.

The Subordinate Judge held that there was no valid dismissal of the 1st plaintiff as the dismissal, if any, was not resolved upon at any meeting of the Temple Committee but was only resolved upon by the managing member and that the matter having been asked to be brought before a meeting of the committee, there has not been any resolution of the committee about the dismissal. He also held that the settlement with the defendants

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6 to 8 was not true, that the surrender of the lease by the 2nd defendant was invalid in law and that no payment was ever made by the 2nd defendant to defendants 6 to 8. The Subordinate Judge also held that there has been no appointment of defendants 7 and 8 as trustees. Against the said decision the 2nd defendant appealed.

T. V. Venkatrama Iyer for the Appellant.

T. Rangachariar and *C. Krishnamachariar* for Respondents.

The Court delivered the following

Judgment:—This is a suit brought by two out of five trustees of a temple to recover rent for three faslies, 1316, 1317 and 1318 and the first question is as to whether the suit was properly instituted as the subordinate Judge has held. As to that, it is objected, in the first place, that the 1st plaintiff had been dismissed by the Kumbakonam Temple Committee from his office of trustee before he institution of the suit. It does not appear from the exhibits in the case that he has ever been finally dismissed by the Committee (see Ex. T of the 11th February 1912 and Ex. C of the 5th January 1913 from which it appears that the question of his dismissal was still to be settled in circulation.) Apart from this, it is not suggested that he had ever been called upon to answer the charges in respect of which it was proposed to dismiss him, and therefore, even if they had purported to dismiss him, such an abuse of the rules of natural justice, it is well settled, would invalidate the dismissal in the case of an office of this kind. It appears that the managing member of the Temple Committee sent proposals to the other members of the Committee to dismiss the 1st plaintiff which is a very extraordinary method of conducting temple business of this importance; and before he had received answers from all the members took upon himself to inform the plaintiff that he had been dismissed. The chairman had, in our opinion, no right to proceed in this way, and one of the members who replied, was fully justified in requiring that the matter should be further considered. We hold that the 1st plaintiff was not properly dismissed and that the first objection fails.

The next objection is that at the time the suit was brought the 7th and 8th defendants had been appointed trustees of this Devasthanam by the Temple Committee. That is contested on the other side, but we assume for the purposes of this case

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that they had been duly appointed. It is then said it was not competent to the 1st and 2nd plaintiffs to institute suit by themselves without consulting the other trustees whom they have impleaded as the 6th, 7th and 8th defendants. At one time there was a considerable body of authority in this court in favour of that view namely *Parameswaran* v. *Shangaran* [1], *Puranathan Somayajipad* v. *Shankara Menon*,[2] *Savitri Antarjanam* v. *Raman Nambudri* [3]. But in *Maryil Raman Nair* v. *Narayanan Nambudripad* [4], doubts were expressed as to the soundness of that view, and the question was referred to a Full Bench in *Karattole Edamana* v. *Unni Kannan* [5].

The Full Bench did not find it necessary to decide the general question but based their decision on the terms of the Transfer of Property Act applicable to the suit which was a suit for redemption. However since that time a view adverse to the view taken in the earlier cases has been expressed in a long series of cases beginning with *Peria Karuppan* v. *Velayuthan Chetti* [6] which followed the decision of the Calcutta Full Bench in *Pyari Mohun Bose* v. *Kedarnath Roy* [7] and this was followed by one of us sitting on the Original Side in *Rasu Mudaliar* v. *Veerasami Pillai* [8] and subsequently the same view was taken by Benches of this Court in *Kunhan* v. *Moorthi*, [9] *Malappurathi Nambi* v. *Chinnazhi Krishnan*[10] and quite recently in *Narayanan Chettiar* v. *Lakshmanan Chettiar* [11]. In these circumstances having regard to the fact that all the later cases are practically agreed on this point, we must hold that this objection also must be overruled. I may mention that the same view has been taken in *Biri Singh* v. *Nawal Singh*[12].

The next question is whether the alleged payment to defendants 6, 7 and 8 and settlement with them was valid and binding on the trust. We are quite prepared to accept the law as recently laid down in *Ullattil Kulathil Nethiri Menon* v. *Mullapulli Gopalan Nair*[13] that even one out of many trustees can receive

1. (1890) I. L. R. 14 Mad. 489.
2. (1899) I. L. R. 23 Mad. 82.
3. (1900) I. L. R. 24 Mad. 266.
4. (1902) I. L. R. 26 Mad. 461.
5. (1903) I. L. R. 26 Mad. 649.
6. (1906) I. L. R. 29 Mad. 302.
7. (1899) I. L. R. 26 Cal. 409.
8. (1908) 18. M. L. J. 495.
9. (1910) I. L. R. 34 Mad. 406.
10. (1911) 2. M. W. N. 587.
11. (1915) 28 M. L. J. 571.
12. (1898) I. L. R. 24 All. 226.
13. (1915) 29 M. L. J. 290 at 297.

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and give a good discharge for rent and similar payments of income, if he has or is held out by his co-trustees as having authority to do so. There is no question in this case either of defendants 6, 7 and 8 having had authority from the other trustees, the plaintiffs, or having been held out as having authority. The evidence is that there had been disputes between the plaintiffs and the 6th defendant out in consequence, it is alleged, of his conduct while he was in management of the trust, and in consequence of those disputes the 1st and 2nd plaintiffs had actually sent the notice Exhibit N 1, on the 13th September 1908 to the 2nd defendant giving him notice not to pay to the 6th defendant but to pay to them. This was before the alleged appointment of the defendants 7 and 8 as trustees. This clearly amounted to a revocation of any authority which the 6th defendant previously had to receive the rent on behalf of the general body of trustees. Subsequent to this the defendants 6, 7 and 8 without any authority from the plaintiffs and without consulting with them sent 2nd defendant Exhibit II calling upon him to pay the arrears of rent due, telling him not to pay to the minority, that is to say, the plaintiffs. In our opinion, assuming that the 7th and 8th defendants were trustees, these three trustees had no power in this way to usurp the duties of the trust and to say that payment should be made to them. In the circumstances we do not think that the 6th, 7th and 8th defendants had any authority to receive the rent, still less to enter into the settlement which is relied upon for the defendants. It is not necessary to consider in this case whether at a properly convened meeting a majority of the trustees might decide that payment should be made to them alone to the exclusion of the other trustees, because in the present case it is not alleged that any such meeting had been held or any such proposal submitted to the other trustees. But it has been unnecessary to consider whether the defendants 7 and 8 were really appointed trustees, or whether the payment was in fact made by the 2nd defendant to these defendants, a fact which is disputed by the plaintiffs

In the result, the appeal fails and must be dismissed with costs. At the request of the appellants we direct the decree to be varied by inserting that the payment is to be made to the 1st plaintiff and the 6th defendant on behalf of the Devasthanam.

PRIVY COUNCIL.

[On appeal from the High Court at Calcutta].

Present:—Viscount Haldane, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

Dulhin Genda Kunwar .... * *Appellant.*

v.

Harnandan Prashad Singh and others ... *Respondents.*

P.C.

Dulhin Genda Kunwar *v.* Harnandan Prashad Singh.

Will—Execution—Social position of witnesses—Suspicion—Evidence—Note of evidence of proposed witness —Privileged from production — Non-production irrelevant.

Where the will was not one which, a Hindu gentleman, situated as the testator was, might not reasonably and naturally have made and there was nothing in the case to suggest that the will had been forged or that the witnesses who gave evidence as to the preparation and as to the due execution of the will had committed perjury, their Lordships declined to accept the contention that the will should not be accepted as a genuine will because the witnesses to its execution, were not of superior position. In such a case something more than mere suspicion was necessary to make convincing an argument based on the social position of the witnesses.

Held, also, The notes of the evidence which one of the witnesses could give obtained from the witness by a person acting on behalf of the appellant and for the purposes of the appellant's brief in the litigation as to the grant of the probate of the will was privileged from production and the High Court erred in allowing their minds to be influenced in considering the evidence, by the fact that it was not produced.

Appeal from a judgment and decree of the High Court dated August 29, 1913 reversing a judgment and decree of the District Judge of Mozaffurpore dated July 28, 1909.

The facts of the case are sufficiently set forth in their Lordship's judgment.

De Gruyther, K. C. and *Sir W. Garth* for the appellant:—There was positive and affirmative evidence as regards genuineness of the will. The will was reasonable, natural and proper in its terms. The signature of the testator was not challenged and it was only suggested that he must have signed a blank paper. The suspicions entertained by the High Court were based upon theories and suggestions outside the case and unsupported by evidence. The will was not registered and there was some delay in production thereof. This was sufficiently accounted for by the grief the lady was in. It was drafted by Tajammal, an honest Mahommadan pleader who was known to the testator and the doctor. It was enough to show that the will was reasonable and probable.

* 21st February, 1916.

P. C.

Dulhin Genda Kunwar v. Harnandan Prashad Singh.

Reference was made to *Jagrani Koer* v. *Koer Durga Prosad* [1]

Sir E. Richards, K. C. and *A.M. Dunne* for the Respondents submitted that the execution of the will was not proved. There was not a single independent witness who came forward to give evidence in support of the will. The onus of proving the will beyond a reasonable doubt lay on the appellant and he has failed to discharge it.

Reference was made to *Sree Ramchander Dey* v. *Gopaul Chunder Chuckerbutty* [2], *Chotey Narain Singh* v. *Ratan Koer* [3], and Indian Evidence Act of 1872.

De Gruyther replied.

The judgment of their Lordships was delivered by

Sir John Edge.

Sir John Edge:—This is an appeal from a decree, dated the 29th August, 1913, of the High Court at Calcutta, which set aside a decree dated the 28th July, 1909, of the District Judge of Mozufferpur granting probate of the will of one Kishun Kishore Narayan Singh, of Sursand, who died in November 1905. The only question in this appeal is as to whether the will, of which the appellant has sought to obtain probate, was executed by Kishun Kishore Narayan Singh or is a forgery. The appellant who propounded the will is the senior of the two widows of Kishun Kishore. The will which she propounded is dated the 15th November, 1905.

Kishun Kishore was a zemindar living at Sursand, in the district of Mozufferpur. He was an elderly man, and had been twice married, but he had no issue by either of his wives, and he had no near agnatic relations. The caveators, who objected to probate of his alleged will being granted were distant cousins of his, with none of whom is it proved that Kishun Kishore had ever been on terms of intimate friendship.

Kishun Kishore had been originally a comparatively poor man, but at the time of his death the income of his estate exceeded 60,000 rupees a year, and it is stated that, contingently on his surviving certain widows, he was the heir to a still larger estate.

On the 10th November, 1905, Kishun Kishore, accompanied by his two wives and certain of his servants and dependants,

1. (1913) L. R. 41 I. A. 80 s. c. 26 M. L. J. 153.
2. (1894) I. R. 22 I. A., 12, 14, 19. 3. (1866) 11 M. I. A. 28.

P. C.

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Sir John Edge.

went from Sursand to Sonepur to attend the bathing fair there. He was suffering from dysentery, and cholera having broken out at the bathing fair, he became nervous as to the state of his health, and in the afternoon of the 13th November he sent a man in his employment, named Mahbub Hossein, with a carriage for Major Gwyther, of the Indian Medical Service, who was the Civil Surgeon in medical charge of the bathing fair at Sonepur. Major Gwyther found that Kishun Kishore was suffering from dysentery, and was weak and much afraid of the disease and its consequences. Major Gwyther saw Kishun Kishore again at 9 A. M. and at 5 P. M. on the 14th November, and between 10 and 11 o'clock of the forenoon of the 15th November. When Major Gwyther saw Kishun Kishore on the morning of the 15th, Kishun Kishore, in Major Gwyther's opinion, was not very weak, his condition was a good deal improved, and he was in a fit state of mind to execute any document. Major Gwyther did not notice any choleraic symptoms in the condition of Kishun Kishore. Major Gwyther did not again visit Kishun Kishore. He promised Kishun Kishore to call again in the evening of the 15th if he were sent for. Major Gwyther has stated in his evidence that Kishun Kishore's carriage did not call for him that evening at the time when he expected it, and, consequently, thinking that he was not required, he went to attend to another call, leaving instructions with his native servant that he should be sent for should his services be urgently required. Later in the evening Major Gwyther went to a ball, from which he was not summoned to attend to Kishun Kishore. Their Lordships accept Major Gwyther's statement as correct. There is evidence, which their Lordsips see no reason to doubt, that a servant of Kishun Kishore was sent in the evening of the 15th to bring Major Gwyther to see Kishun Kishore, and found that Major Gwyther was out, and that later, at about 1 o'clock in the morning of the 16th, when Major Gwyther was at the ball, Sham Behari Singh was sent to call Major Gwyther to Kishun Kishore's tent; and Kishun Kishore was then conscious. Major Gwyther's servant, probably considering that Major Gwyther's services were not urgently required by Kishun Kishore, did not inform Major Gwyther that he had been sent for. The bathing fair having been broken up on account of the outbreak of cholera, Major Gwyther left Sonepur at 10 A.M. of the 16th November.

P. C.

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Kishun Kishore died, according to the evidence on behalf of his widow, the appellant, of dysentery at about 3 A.M. of the 16th November. According to the case of the caveator respondents, Kishun Kishore was suffering from cholera in the forenoon of the 15th November, and by midday of the 15th was unconscious and died of cholera at about 5 o'clock in the afternoon of that day. If it be true that Kishun Kishore was unconscious by midday of the 15th November and died that afternoon, the case for the appellant is a false case and the will which has been propounded was not executed by Kishun Kishore.

As translated, the will which has been propounded is as follows:—

"I am Babu Kishun Kishore Narayan Singh, son of Babu Bhagwat Narayan Singh deceased, by caste a Pachhmia Babhan, by occupation a zamindar, inhabitant and part proprietor of mouzah Sursand, pergunnah Basautar, thana Pupri, Sub-Registry Parihar, district Mozufferpur.

"I, the declarant, have, at present, two wives, viz., Dulhin Genda Kunwar and Dulhin Dhanwanti Kunwar, and a Dattak son Babu Chandreshwar Prashad Narayan Singh alias Paramhansji, living. For sometime past I kept the said adopted son with me and brought him up and maintained him, and, in consultation with and with the consent of the two wives, I, with my first wife, took him in adoption in the Dattak form on the 24th Jeth, 1312, F.S., from Babu Sarju Prashad Narayan Singh, father of Babu Chandreshwar Prashad Narayan Singh, *alias* Paramhansji, aforesaid, according to the Shastars after performance of the Dattak Homa, &c., with all attendant rites, and I with my two wives have come to the Harihar Chhatar fair at Sonepur for the performance of Kartik Ashnan, and I am now unwell, and therefore I consider it proper to make in my lifetime some provision regarding my properties as per details given below. I also had a mind from before to execute a will. Therefore I, while in a sound state of body and mind, without being pressed and induced by anyone, make this will according to the details given below. But be it known that I, the declarant, myself shall remain in possession of all the properties during my lifetime, and after my death the management of my properties shall be made and the possession thereof shall be held according to the directions given below.

"1. Whatever properties I have at present are not my ancestral properties, I have inherited them as an heir from other gotias, and so they are considered as my self-acquired properties. I am fully competent to make arrangement, therefore, in any manner I think proper. I therefore appoint my first wife, Dulhin Genda Kunwar, as executrix. The said executrix shall manage all works according to the directions given below.

"2. I have ancestral Thakurji in my house. His Sewa, Puja, Sameya, and Bhograg shall continue to be performed in the same way as have continued to be done at a cost of 1,200 rupees annually from the income of the estate.

"3. All the expenses required for maintenance, education, Janeo, marriage, &c., of Babu Chandreshwar Prashad Narayan Singh, *alias* Paramhansji, aforesaid, shall be defrayed from the income of my estate. After his marriage, the said Babu Chandreshwar Prashad Narayan Singh, *alias* Paramhansji, shall, during

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the lifetime of my (last surviving wife), continue to receive 400 rupees per month from my estate to meet his necessary personal expenses.

"My two wives shall, in equal shares and in life-interest, be Maliks of, and be entitled to, the income of the estate left after deduction of the above-mentioned expenses and the Government demands. But they shall have no right whatever to make any alienation. They shall get their respective names recorded in equal shares as their life-interest in the Government and the Zamindari Sherishta. If there be any misunderstanding between the two wives, they shall have no right to divide my estate between themselves On the contrary, my second wife shall in that case be competent to take and appropriate the income in proportion to her share from the said executrix after deduction of the aforesaid expenses, and after the death of the said executrix, Dulhin Dhanwanti Kunwar, my second wife, shall be competent to take annually her moiety share of the fixed income from the person managing my estate after deduction of the expenses mentioned above. After the death of any of my wives, Babu Chandreshwar Prashad Narayan Singh, alias Paramhansji, aforesaid, shall be absolute proprietor of the moiety share of my wife who dies first, and after the death of my two wives, the said Babu, i e., Babu Chandreshwar Prashad Narayan Singh, alias Parambansji, shall be absolute proprietor of the entire estate.

5. "Babu Chandreshwar Prashad Narain Singh, alias Paramhansji, aforesaid, is now about 5 years old. He shall remain during his minority under the protection of my first wife, who shall be his guardian If my first wife dies during the minority of the said Babu Chandreshwar Prashad Narayan Singh alias Paramhansji, then my second wife, Dulhin Dhanwanti Kunwar, shall be the guardian, and the management of all the properties shall remain in the hands of my second wife till the said Babu Chandreshwar Prashad Narayan Singh *alias* Paramhansji, comes of age, and she, my said second wife, shall manage the properties with the advice of Babu Sarju Prashad Narayan Singh who is my relative, and shall not unnecessarily contract any debt on the properties of the said minor.

"6. Should the said Babu Chandreshwar Prashad Narayan Singh, *alias* Paramhansji. die childless within seventy-five years after my death, then the other sons of the said Babu Sarju Prashad Narayan Singh, who are now in existence and may remain alive till that time, shall have possession of the entire properties as absolute proprietors and legal heirs. But from the date of the death of the said Babu Chandreshwar Prashad Narayan Singh, *alias* Paramhansji, the expenses for the maintenance, education, marriage, &c., of the sons who may be living at that time shall be defrayed by the said executrix from my estate.

"7. My both wives have all along been faithful and obedient to me, and they are still so. I have sometime ago already given some properties to my first wife, Dulhin Genda Kunwar, in absolute proprietary right under a deed of gift, and as to Dulhin Dhanwanti Kunwar, my second wife, I had a mind to give her also some properties of the annual income of 5,000 rupees in absolute proprietary right, but I could not till now execute any deed in that respect. If my life is spared I shall myself execute any deed, and in case of non-execution of the same during my lifetime, I hereby direct, permit, and authorise my first wife, Dulhin Genda Kunwar, to give to my second wife properties of the annual income of 5,000 rupees in absolute proprietary right, in such mouzahs and such places as she may think proper, and to execute some deed in that behalf.

"8. As to Babu Ram Bahadur Singh Mokhtar, son of Babu Ajodhya Singh, inhabitant of Chapra, pergunnah Tariani, who is my well-wisher, and devoted and faithful to me, my earnest desire is to give him some properties in absolute

right in lieu of his aforesaid services, but up to this time I have not concluded any such transaction (executed any deed). If I survive I shall myself execute (a deed), and if I cannot do so in my lifetime, I hereby direct, permit, and authorise the said executrix of my estate to give, according to my direction and permission to the said Babu Ram Bahadur Singh any mouzah of the annual income of 300 or 400 rupees in absolute proprietary right, and execute any document in that behalf.

"9. There are several persons who are my well-wishers and sympathisers whom I wished and promised to give some money as reward in the probate case of Dulhin Jagatrup Kunwar, petitioner, against myself, objector—a fact which is known to the said Babu Sarju Prashad Narayan Singh. Up to this time I have not paid them anything. The said executrix shall also pay them from my estate. Therefore, I execute this last will so that it may be of use when required.

" Dated the 15th November, 1915.

" The will executed by me is correct.

" BABU KISHUN KISHORE NARAYAN SINGH.

" By my own pen.

" *Witnesses* :—

" Khakhan Jha, Purohit, inhabitant of mouzah Kalyanpatti, otherwise called Korlahi, pergunnah Basautar. By my own pen.

" Sham Behari Singh, inhabitant of mouzah Basantpur, pergunnah Rati. By my own pen.

" Mewa Lal Das, inhabitant of mouzah Basantpur Pakri, pergunnah Mahila. By my own pen.

" Mukti Parihast, inhabitant of mouzah Buthra Khutauna pergunnah Bhala. By my own pen.

" Mahabir Prashad Pandey, inhabitant of mouzah Sursand Basautar. By my own pen.

" Syed Tajammul Hussain, pleader of Munsiff's Court, Hajipur. By my own pen.

" Udit Singh, inhabitant of mouzah Ghataro Toke Megha Dih, Pergunnah Bisara. By my own pen.

" Lalji Pattack, inhabitant of Masuria, pergunnah Madhal, district Saran. By my own pen.

" *Writer of the Will* :—

" Mahbub Hossein, inhabitant of mouzah Bakhri Subain, Chakla Garjaul, pergunnah Bisara.

" Read over and explained by me to the executant."

On behalf of the caveators, respondents, it is alleged that the witnesses who were called to prove the execution of the will which has been propounded have given false evidence, and that Kishun Kishore did not in fact execute the will. On behalf of the caveators, it has also been contended that Chandreshwar Prashad never was in fact adopted by Kishun Kishore, and that it is to be inferred that the alleged will is not a genuine will, as it, according to the caveators, contains a false statement that Chandreshwar Prashad had been adopted, which a pious Hindu, such as Kishun Kishore was, would not

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have made; also it has been the case of the caveators that the will should not be accepted as a genuine will of Kishun Kishore, as it had not been prepared by a lawyer of position, had not been witnessed by any independent person of position, such as the owner of a considerable zamindari or a Government official, had not been registered, and had not been publicly put forward until the 22nd December, 1905. It was also contended on behalf of the caveators that a pious Hindu would not have made such a disposition of his property as that contained in the sixth clause of he will.

All the attesting witnesses except two, one of whom had died and the other of whom was too ill to appear, were called on behalf of the appellant, and spoke to the due execution of the will. Of the witnesses who gave evidence as to the execution of the will one was Tajammul Hussain, a pleader, of Hajipur, and another was Mahbub Hussain, who assisted Tajammul Hussain in drafting the will. Tajammul Hussain apparently knew little about the drafting of wills and less about Hindu law; he was an old Mahommedan pleader with a character as an honest man, which, so far as their Lordships can see from the record, was above suspicion. Mahbub Hossein, part of whose duty in the employment of Kishun Kishore was to attend to the litigation in which Kishun Kishore was from time to time concerned, apparently took the leading part in drafting the will. Neither Tajammul Hussain nor Mahbub Hossein could be regarded as a lawyer skilled in the drafting of Hindu wills. But regard must be had to the circumstances under which they were employed to draft the will for Kishun Kishore. On the 14th November Kishun Kishore was in a nervous condition as to the state of his health, and fearing that he was suffering from cholera, tried to obtain the assistance of Jogendar Mookerji, a pleader, of Mozufferpur, whom he regularly employed, but the services of Jogendar Mookerji could not be obtained, as he was in Calcutta, and Kishun Kishore then directed Mahbub Hossein to send for Tajammul Hussain. It is said that there were other pleaders of position who might have been called in. Whether there were any pleaders of position whose services were then available their Lordships do not know, but men who believe that they are suffering from cholera and are anxious to make their wills are more likely to send for a pleader whom they

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do know than to send in quest of other pleaders whose services may or may not be available. However that may be, Kishun Kishore sent for Tajammul Hussain, and at 7 o'clock of the morning of the 15th November Tajammul Hussain was brought to Kishun Kishore.

An attempt was made on behalf of the caveators to prove that Mahbub Hossein was at Mozufferpur, and not at Sonepur on the 15th November, and thus to discredit all the evidence as to the preparation and the execution of the will. The attempt failed in the Court of the District Judge, but it succeeded in the High Court, where the learned Judges who heard the appeal came to the conclusion that it was probable that Mahbub Hossein was not at Sonepur at all on the 15th November. Major Gwyther was an absolutely independent witness, and his evidence puts it beyond a doubt that when he saw Kishun Kishore after 10 a. m. on the 15th November, Mahbub Hossein was writing in the tent in which Kishun Kishore was. Major Gwyther knew Mahbub Hossein, as it was Mahbub Hossein who had brought him in Kishun Kishore's carriage to his tent in the afternoon of the 13th November. Mahbub Hossein left Sonepur for Mozufferpur in the evening of the 15th November.

An attempt was made on behalf of the caveators to have the question as to the adoption of Chandreshwar Prashad formally raised and decided in this case. Although the question as to the alleged adoption is not one which could be excluded from consideration by a Court when considering whether it is probable that the will is a genuine will or a fabrication, it could not be tried as a material and vital issue on an application for a grant of probate, the necessary parties to such an issue not being before the Court. Further, a finding either for or against the adoption would not be decisive as to whether the will which was propounded was a genuine will or a fabrication. The District Judge before whom the application for the grant of probate first came rightly declined to frame an issue as to the alleged adoption. The caveators were, however, not precluded from questioning the adoption of Chandreshwar Prashad. They cross-examined at great length and very fully some of the appellant's witnesses on the subject, and they called evidence in an attempt to disprove the alleged adoption. Their Lordships have been pressed to take into

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their consideration, on the question as to whether the will is a genuine will or a forgery the evidence as to the adoption, all that their Lordships need say is that, having regard to the evidence brought out by the cross-examination of witnesses for the appellant, and having regard to the evidence of the witnesses who were called by the caveators to prove that Chandreshwar Prashad was not adopted, they see no reason to doubt that Chandreshwar Prashad was adopted by Kishun Kishore.

The provision made by the will for the wives of Kishun Kishore, and the provision made for Chandreshwar Prashad do not appear to their Lordships to be unreasonable, or such as a Hindu gentleman situated as Kishun Kishore was might not reasonably and naturally have made. He was apparently an affectionate husband, and he desired that Chandreshwar Prashad should enjoy the advantages of having been taken by him in adoption as his son. The provision in the 6th clause of the will to take effect in the event of Chandreshwar Prashad dying childless within seventy-five years after Kishun Kishore's death was doubtless unusual, as by the 6th clause Kishun Kishore intended that, in the event mentioned in that clause occurring, the property should pass to a family which does not appear to have been related in blood to him, but it must be remembered that he had no near relatives in blood, and he may reasonably have desired to confer a benefit on blood relations of his senior wife in the event of his adopted son dying without issue within 75 years of his own death. It is not necessary in these probate proceedings to decide what is the effect in law of the provisions in the will to which their Lordships have referred, but they fail to see that the will was not a will which a Hindu gentleman situated as Kishun Kishore was might not reasonably and naturally have made. Under these circumstances, and there being nothing in the case to suggest that the will had been forged or that the witnesses who gave evidence as to the preparation, and as to the due execution of the will had committed perjury, the contention that the will should not be accepted as the genuine will of Kishun Kishore because the witnesses to its execution were not of a superior position is not sound and is contrary to the view of the law as expressed by this Board in *Chotey Narain Singh* v. *Mussamat Ratan Koer* [1] and more recently in *Jagrani Koer* v. *Kuar*

1. (1894) I. L. R. 22 I. A. 24.

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Durga Prasad 1. Something more than mere suspicion is necessary in such a case to make convincing an argument based on the social position of the witnesses. If the will had been executed at Sursand where Kishun Kishore's home was, it is possible that he might, by way of precaution, have obtained as witnesses to his will some neighbours of a superior class, but this will was executed at Sonepur in the confusion which must have resulted from the outbreak of a severe epidemic of cholera, and the breaking up of the bathing fair by the Government's orders in consequence of the cholera. The attesting witnesses were such as one would reasonably expect to be available on the occasion. It had been intended to get Major Gwyther to attest the will in the afternoon of the 15th November, but owing to some delay in sending Kishun Kishore's carriage for Major Gwyther, that officer did not know that his attendance at Kishun Kishore's tent was required that afternoon, and he did not attend.

Having regard to the circumstances that Kishun Kishore died at Sonepur and to the grief of his widows caused by his death, their Lordships attach no importance to the fact that the will was not registered, or to the fact that the will was not presented to the Court until the 22nd December. If there was any reasonable cause for doubting the evidence as to the execution of the will the delay in presenting the will to the Court might possibly raise some suspicion as to the genuineness of the will, but their Lordships are satisfied on the evidence that the will which has been propounded is the genuine will of Kishun Kishore.

The District Judge, after a careful consideration of the evidence and of the probabilities of the case, granted probate of the will. The learned Judges of the High Court in appeal set aside the decree of the District Judge on what appears to their Lordships to have been mere grounds of suspicion, which were not justified by the evidence before them. The learned Judges apparently allowed their minds to be influenced in considering the evidence by the fact that a note of the evidence which Major Gwyther could give was not produced in Court for the information of the caveators. That note was obtained from Major Gwyther in 1906 by Mahbub Hossein, acting on behalf of the appellant, and for the purposes of the appellant's brief in this litigation as to the grant of probate of the will. It was a note which was

1. (1913) I. L. R. 41 I. A. 80.

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privileged from production, and which the caveators were not entitled to see.

The material facts, as their Lordships on the evidence find them, are as follows:—

Kishun Kishore, after his arrival at Sonepur, having become nervous as to the state of his health, decided to make a will as soon as possible, and with that object sent a messenger, Sirdar Singh, on the 14th November to Mozufferpur to bring to him at Sonepur, Jogendar Mookerji, the pleader of Mozufferpur. The messenger returned to Sonepur about midnight with the information that Jogendar Mookerji was at Calcutta: Kishun Kishore, on being informed that Jogendar Mookerji was absent from Mozufferpur, directed that a telegram should be sent to him, and that in the meantime Tajammul Hussain, whom he knew, should be sent for. Tajammul Hussain lived at Hajipur, not far from Sonepur. Mahbub Hossein thereupon sent Udit Singh for Tajammul Hussain, who was brought to Kishun Kishore early on the morning of the 15th November. After the arrival of Tajammul Hussain, Kishun Kishore gave to him his instructions for the preparation of his will, and Tajammul Hussain, with the assistance of Mahbub Hossein, who acted as the scribe, prepared a draft will. Mahbub Hossein was making a fair copy of the draft in Kishun Kishore's tent when Major Gwyther called on the morning of the 15th. That fair copy was read out to Kishun Kishore, and, having been approved by him, he at about 1 o'clock in the afternoon of the 15th November executed it as his will in the presence of several persons, who signed the will as witnesses. The will which was so executed by Kishun Kishore is the will which has been propounded. Kishun Kishore was, although physically weak, quite capable mentally and physically of making the will. His testamentary capacity is not now disputed. Kishun Kishore died about 3 A.M. on the 16th November.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and the decree of the High Court should be set aside with costs, and the decree of the District Court should be restored.

The respondents must pay the costs of this appeal.

Solicitor for Appellant:—*Barrow, Rogers and Nevill.*

Solicitors for Respondents:—*Watkins and Hunter.*

PRIVY COUNCIL.

Present:—Viscount Haldane, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

[On Appeal from the High Court at Allahabad.]

Adwaitya Prasad and others ... *Appellants**

v.

Baldeo Das and another ... *Respondents.*

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Adwaitya Prasad *v.* Baldeo Das.

Hindu Law—Will—Self acquired property—Verbal power to adopt—Widow—Testimony af—Unshaken in cross-examination—Probabilities—Practice — point not argued in High Court.

A sonless Hindu separated from his brothers and in possession of large self-acquired property, made a will by which he gave his widow his entire estate for life in the event of his dying without a son, and appointed several persons as executors. Subsequently the widow adopted a son of her husband's nephew (brother's son) alleging that she was verbally given power to adopt by the testator. Two points having been argued before the Trial Judge, *viz.*, (1) whether the adoptee could validly become the testator's son by virtue of the will and (2) whether the widow had authority to adopt, the first point of which was not argued in appeal :

Held, reversing the judgment of the High Court, that having regard to the balance of testimony of five respectable persons not shaken in cross-examination, (though the widow was not called as a witness by either party) and the probabilities of the case, the widow was given power to adopt ; *held*, further, that the first point not argued on appeal in the High Court could not be raised before the Privy Council.

Appeal from a judgment and decree of the High Court dated August 5, 1912 reversing a judgment and decree of the Court of the Subordinate Judge of Benares dated September 21, 1909.

The facts of the case are sufficiently set forth in their Lordship's Judgment.

Dunne appeared for the Appellants.

De Gruyther, K. C. with him *Dube* for the Respondents.

The judgment of their Lordships was delivered by

Viscount Haldane.

Viscount Haldane:—Raghunath Prasad, a Hindu mahajan and dealer in money, in the City of Benares, died on the 11th February, 1893, leaving property, partly ancestral but mainly acquired, of the value of over three lakhs of rupees. He was about 50 years of age at the date of his death. He had married three times, and his third wife and a daughter by her survived him. He had no son by any of the three wives. Until the end he appears to have been hopeful that a son might be born to him who would perform for him the posthumous ceremonies which the Hindu religion enjoins. Nearly seven years after his death,

* 28th February 1916.

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his widow by deed adopted to him a boy of about five years old. The only question left in this appeal is whether the dead man gave her authority to make the adoption. It is a question of fact, and the answer depends on what reliance ought to be placed on the testimony of certain witnesses.

On the 25th November, 1895, Raghunath Prasad executed a will. Before referring to its terms, which are material in estimating the probabilities on the question of the authority to adopt, it is necessary to state what were the relations of the testator to other members of his family. He had three brothers, and from these he had separated, so that the family had for some time ceased to be joint. He had a nephew, Jadunath Prasad, the son of a younger brother, and several sisters, one of whom had a son, the respondent, Baldeo Das The surviving one of the testator's wives, afterwards his widow, was named Musammat Saraswati Bibi. She is a respondent in this appeal. The nephew Jadunath, who lived in the house next door to the testator, was a young man of doubtful character, by his own testimony in the witness-box given up to dissipation. He had squandered his fortune, and the testator had no confidence in him. In the respondent, Baldeo Das, on the other hand, he obviously had confidence. Indeed, Baldeo and his family lived in the same house with him.

Turning to the will, the testator begins with a narrative of his family history He goes on to make a very modest provision for his surviving daughter. He then leaves the bulk of his property to his wife, but in a fashion which, as is subsequently made plain, gives her only a life interest. He puts her under restrictions which are designed to prevent her from visiting the members of her own family. As she is young, he appoints guardians to see that she regulates her conduct, and behaves as becomes a "parda-nashin" lady. If she violates the injunctions of this will she is to forfeit all right to enjoyment of the property, and is to be lodged in a suitable house and put on an allowance of 50 rupees a month. He then goes on to refer to his family deity, an idol named Sri Girraiji, the Thakur particularly worshipped by him. He dedicates to this idol the house in which it is located, and makes full provision for its maintenance and continued worship. He gives directions as to his funeral ceremonies, gaya and shradh, and says that these funeral ceremonies are to be performed by

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his nephew, Baldeo Das, or, if he cannot officiate, by Chatarbhuj Das, another son of one of his sisters. His nephew, Jadunath, by reason of his profligacy and irreligion, is not to join in any of the ceremonies. He then directs the payment of various legacies and annuities. He goes on to provide that, if Jadunath, with whom he has severed all connection, falls, as he probably will, into want, he is to be supplied with food and clothing, but adds that he is excluded from all rights. The executors are not to allow him to visit their houses, and all connection, with him is to be severed. It appears from the tenor of the will that the persons whom he appointed as guardians were intended to act as executors along with the widow, and they ultimately proved the will. It remains to refer to its concluding paragraph. The material part of this paragraph was in these terms:—

"The will now made is only for my wife. If, by the grace of God, a son is born to her, he will be the sole executor, donee, and owner and my wife aforesaid shall be his guardian in the same way as the other guardians whom I have appointed. If my wife dies and the male issue also does not survive, all my estate . . . . will be owned by Sri Girrajji" [the Thakur].

It will be observed that the will contains no power to adopt a son. It will also be observed that it was made more than two months before the testator's death. He had been suffering for some time from phthisis, a disease which appears to have become acute at the end, and to have caused his death, but it is not clear that he knew the nature of his disease, or realised the approach of danger at the time when he made his will. From the hope expressed that he might still have a son, and other expressions used by him in the document, it is doubtful whether he regarded himself as even near his end when he made the will. Up to just before the last his medical adviser was a native hakim, and it is not clear that either the nature or gravity of the disease from which he suffered had been made plain to him. Later on, when he learned his real condition, he may well have altered his mind and desired to provide for an adoption. If he could bring himself to contemplate a son of Jadunath as a possible adoptive son, such a son of a brother's son would be the person most suitable to fulfil the obligations which exist according to Hindu tradition. Jadunath cannot be regarded as a reliable witness, but when he says that Mr. Straight, the superintendent of police, sent him to see his uncle in the interval between the will and the death of the latter, and that he began to be received by him after the interview,

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it is at least possible that the statement may not be without foundation, and that the testator's feelings became in consequence of the interviews somewhat softened.

The question whether, assuming authority to adopt to have been given to the widow, the adoption of Jadunath's son would make him a son of the testator capable of taking under the terms of the will, was raised before the Judge of first instance. He decided the point in favour of the adopted son, and it was not argued again in the Court of appeal and cannot be raised now. As has already been said, the only question to be disposed of is whether the testator, just before his death, gave to his widow the alleged authority to adopt. It is not in dispute that a son was born to Jadunath in September 1898, some two and a half years after the testator's death, and that more than four years later, by deed dated the 30th January, 1903, the widow formally adopted him as her own and her late husband's son. Her delay may be accounted for by hesitation to give up personal benefits to which she was entitled so long as there was no son.

The story of the alleged authority to adopt is the subject of acute controversy. The Indian Judge who tried the case, the Subordinate Judge of Benares, decided for the version of the appellants. All the witnesses except one had been before him in the box, and he believed their evidence and rejected the very different story put forward by the respondent Baldeo Das and his witnesses. The High Court at Allahabad, on the other hand, consisting of Sir Henry Richards, C. J. and Tudball, J. disbelieved the appellant's version, and accepted that of Baldeo Das. This conflict of opinion has imposed on their Lordships the necessity of giving close consideration to the details of the evidence. The acceptance or rejection of the testimony put forward on each side must depend on two considerations. The first question relates to the form of the evidence itself, and the character of the witnesses who gave it. The second is as to the antecedent probability of the evidence actually given. Their Lordships now proceed to the first of these questions.

At the trial the plaintiff was Baldeo Das, who was, as has already been stated, one of the executors, and was also a trustee under the will. The defendants were the minor, the adopted son Adwaitya Prasad, Musammat Bibi Saraswati, the widow, and the remaining executors or trustees, either original or subsequently appointed,

Motichand, Kesho Das and Dwarka Das. The widow was at first named as guardian *ad litem* to the minor, but on its being alleged that she was colluding with the plaintiff Baldeo Das, the natural mother of the minor, Musammat Gajjo Bibi was appointed guardian in her place. Musammat Saraswati originally put in a written statement to the effect that she had lawfully adopted the minor, but at a later stage she appears to have gone over to the side of Baldeo. She had obviously a certain motive for doing this, for her position as taking for life under the will would have been impaired, under the terms of the final clause of the will, had her adoption been operative. It was alleged by the plaintiff that she had at the earlier stage been under the influence of Jadunath, and in collusion with him put forward the story of the adoption. The other side subsequently took the view that she had come under the influence of Baldeo Das. She was called by neither side as a witness—an omission which appears under the circumstances to have been justifiable on the part of both sides—and she has now been made, along with Baldeo Das, a respondent to the appeal, which is that of the other defendants.

The suit was for a declaration that the adoption was invalid. It appears that the executors had disagreed, partly about the management of the estate and partly about the adoption. One of them, who is now dead, Chhatarbhuj Das, sided with Baldeo. He and Baldeo had filed objections to an application in 1903 by the widow to be appointed guardian to the minor after she had formally adopted him; they took among other points what Baldeo now urges, that there was no authority for the adoption. The Subordinate Judge of Benares, however, appointed the widow, but without, as far as can be seen, deciding the question whether the son was adopted to the testator as well as to the widow. The family generally appear to have throughout held the view that the adoption to both was valid.

Evidence in support of their allegation of authority to adopt was given in the first instance by the defendants, on whom the burden of proving it lay. They put into the box five witnesses, all of good position, who deposed to having been present in the testator's bedroom very shortly before his death on 11th February, 1896, when verbal authority to adopt was said to have been given. There are some discrepancies of a minor kind in their stories, but none that, in the opinion of their Lordships, are

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important, or that are surprising in accounts of a conversation which took place thirteen years before the evidence was given. They all agree in saying that Musammat Saraswati, being a pardanashin lady, was summoned by the testator, her husband, to come into the room where he lay, and sit behind a curtain in order that he might give her instructions. They further agree that he informed her that if Jadunath should have a son born to him she might adopt him. Some of them say that he added that if Jadunath should have no son she might adopt any boy of the testator's family.

Taking these five witnesses severally, the first was Dr. Ganga Singh, a civil surgeon who had retired on a pension. He had, before he retired, received from the Government the title of Rai Bahadur, and was a man of some standing and property. He had been in charge of the Prince of Wales's Hospital. He explained that he was on friendly terms with the testator, but had been called in by him only towards the end. He saw the dying man three times. On the last occasion he was clearly dying and could not speak. But when he saw him on the second occasion, shortly before his death, he told the testator that he was very ill and probably would not recover. Dr. Ganga Singh then went on to say this: "He then called his wife from another room to behind a curtain which hung up close to him, and said: 'The doctor says my illness is serious. I have a nephew; if a son be born to him, you may adopt him, in order that water and cakes may be offered to me.'" The witness was unshaken in cross-examination. The suggestion was made that there had been a quarrel between him and Baldeo Das about a druggist's shop, occupied by his brother-in-law, one Khem Singh, from which Baldeo had threatened to have the latter ejected. Dr. Ganga Singh declared that he knew nothing about the matter, and that he had no share in the shop. Their Lordships agree with the Subordinate Judge who saw this witness and with the High Court in thinking that on this ground there was no reason to doubt his testimony.

The second of the five witnesses called by the defendants as to the authority to adopt was Kali Das Mitter, an Honorary Magistrate and a Municipal Commissioner nominated by the Government. He too knew the testator, who was his fellow-magistrate, well. He had gone to see him, and was present at

the conversation described by the doctor. He confirms the doctor's account of the material point of the conversation, and was not shaken on cross-examination.

The third witness was Dwarka Das, one of the trustees of the will. He was a silk manufacturer and a man of substantial property. He says the testator sent for him and told him that he had done so in order that in his presence he might give his wife permission to make an adoption. He then gives an account of what passed, which is substantially the same on the material points as that given by the two preceding witnesses.

The fourth witness was Jugal Kishore, an owner of zamindari property of considerable extent. His evidence about the conversation and the authority to adopt was similar in all material respects to that of the three preceding witnesses. He says that the testator told him that he wished him to bear witness to the fact that he had given the authority.

The fifth witness was Kesho Das, who was examined on commission. He stated that his occupation was zamindari and banking. His property appears to have been substantial. He confirms the account of the authority. He added that the testator said to him that he had written a will to frighten Jadunath, whose conduct was very bad, and that perhaps the fear of it might bring him to the right path. It is possible that the testator said this, but the occasion was thirteen years before the witness gave evidence, and much turns on the exact words. Their Lordships do not attach much importance to this part of Kesho Das's evidence, but they see no reason to question the accuracy of his recollection of the general direction given about adoption. All the witnesses agree that the testator was in full possession of his faculties.

The evidence on the crucial part of the case called on the other side was that of three witnesses, Baldeo Das, the plaintiff himself, Gobind Das, and Narain Das. Baldeo, who was the testator's sister's son, says that the testator treated him like a son, and that he and his family lived with him until his death. He speaks of the vicious life of Jadunath. He declares that the testator never had confidence in Dr. Ganga Singh, and that during his illness the latter never visited him. He further asserts that Kali Das Mitter never visited him, nor Dwarka Das, nor Jugal

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Kishore. Of the remaining one of the five witnesses, Kesho Das, he makes no mention. He goes on to say that the testator called Harakh Chand, Chhatarbhuj Das, Jagarnath Das, Kishan Das and told them there was no hope of his life, and asked them to open the will, which had been deposited in the Judge's Court, and have it registered and act according to it, and that all of them said that they would act accordingly if he did not recover. He admits, what is significant, that the expenses of the minor were entered in the accounts of the estate and paid out of it. Of those whom he names as having been present when the testator gave the alleged directions, two, Harakh Chand and Chhatarbhuj Das have died, and the other two were not called as witnesses. It will be observed that Baldeo, in his statement in the box, denies that Dr. Ganga Singh was ever called in, and asserts that neither he nor the other witnesses for the minor ever saw the testator during his last illness.

Baldeo Das called two witnesses, Gobind Das and Narain Das, neither of whom gave satisfactory confirmation of his evidence. Gobind Das even says that he regarded the minor as the adopted son of the testator, because the widow adopted him; and Narain Das says that he saw the testator just before his death, and that there was a talk as to whether or not adoption should be made, a talk of which Baldeo had said nothing.

On the evidence their Lordships are of opinion that the balance of testimony is distinctly in favour of the story told on behalf of the minor. It further seems to them that the probabilities are at least not adverse to it. The testator may well, as has already been said, have modified his original view, expressed in his will, before he had come to realise how short his life was likely to be. His dislike of Jadunath, and his repugnance to making him his heir, seemed to have remained. But any son Jadunath might have, it was far from being improbable that he should regard in a different light from Jadunath himself. Such a son, if adopted, might turn out differently and could make offerings to him of a religious efficacy superior to any that could be made by a sister's son. Having regard to the character and standing of the five witnessses called for the minor, and to the way in which they gave their evidence, their Lordships think that their evidence ought to be preferred to what was alleged in the box by

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Baldeo. The discrepancies in the evidence of the five witnesses are comparatively slight, and may well be accounted for when it is remembered that the conversation which they described took place some thirteen years previously. The widow's vacillation in attitude may well have been due, partly to a desire not to be deprived by the provisions of the will which would take effect in case of an adoption, of her enjoyment and control of the property, and partly to the influence which Baldeo Das himself appears latterly to have had with her. Moreover, Baldeo had had differences with his co-executors, and was obviously filled with dislike for Jadunath, a dislike which may have had excellent grounds, but which does not affect the merits of the controversy further than as supplying a motive which may explain Baldeo's bitterness. The Judge who tried the case and saw nearly all the witnesses takes this view, and on a question of evidence such as is this, his view is obviously entitled to great weight.

The learned Judges of the High Court have reversed the decision come to on these grounds. They dwell on the minor discrepancies in the evidence of the five witnesses to which reference has already been made, and on the circumstance that Jadunath admitted in the box that he had been to see Dr. Ganga Singh about giving evidence. The circumstance that the latter speaks of the authority verbally given as one for the adoption of the nephew's son simply, while the others, though agreeing with him as to this, add that the testator said that, should Jadunath have no son, the widow might adopt a boy in the family, is what the learned Judges call a "great discrepancy." Their Lordships do not take this view. The five witnesses were in agreement and were unshaken on the important point as to the adoption of Jadunath's son. The Judges of the High Court appear to have attached too little weight in estimating probabilities to the likelihood that the language of the will, made more than two months before the testator's last illness, might, under the new sense of approaching death, be departed from. They appear to have disregarded the not unnatural change in attitude which might result when the testator found that he had no longer any chance of having a natural son, and that death was staring him in the face. So far from the Judge who tried

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the case having approached the case with bias, their Lordships think, after a close consideration of the judgments in both Courts below, that he has taken a fairer and less one-sided view than that which prevailed in the High Court.

They will, therefore, humbly advise His Majesty that the appeal should be allowed and the decree of the Court of First Instance restored. The respondent Baldeo Das must pay the costs of this appeal and of the appeal to the High Court.

Solicitors for Appellants:—*T. L. Wilson & Co.*

Solicitors for Respondent:—*Douglas Grant.*

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Agency—Power of attorney—*Power—Construction—Power to borrow—Power to pledge credit of firm—Express or by necessary implication—Liability of Principal—Inference—Non-production of account books—Notice—Not calling agent as witness.*

Where the agent of a Chetti money lending firm at Rangoon had pledged the credit of the firm to secure an advance for a client by a Bank, the power of the agent to enter into such transactions being questioned.

Held, that on a fair construction of the power of attorney and in view of the nature of the business the agent had power by necessary implication to enter into the transaction in question, as without such authority it would hardly have been possible to carry on the business of a money lender and financier.

Bryant, Powis and Bryant, Ld. v. *La Banque du Peuple*, (1893) A. C. 170; 177, applied.

The authority to borrow implied an authority to pledge the credit of the firm.

If the authority of the agent is established, the mere fact that the principal did not derive any benefit from the transaction does not rid him of his liability.

The Bank of Bengal v. *Ramanathan Chetty*. (*Mr. Ameer Ali*) *P. C.* 232

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Under the Aliyasantana Law, the property of an individual member of the family goes on his death not merely to the nearest individual relation or relations but to all the members of the nearest branch.

Antamma v. *Kaveri*, (1884) I. L. R. 7 M. 575 explained.

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Parties to a suit, one of whom was a minor entered into an agreement signed by all including the guardian-*ad litem* of the minor to refer the matters in dispute of two arbitrators and in case of difference between them to an umpire, but the application to the Court for reference to arbitration was not signed by the guardian although he was present in Court. The Court made the order for reference to the two arbitrators and on their differing an umpire was appointed. Against his award an application was unsuccessfully made under S. 15 Schedule II of C. P. Code. An application for revision under S. 115 C. P. C. was then presented to the Chief Commissioner and was dismissed. On review however, the arbitration proceedings were set aside by the succeeding Chief Commissioner on the ground that the application for arbitration was not signed by the guardian *ad litem.*

Held, that the application to the Court for an order of reference did not require the signature of parties as of necessity and as no injustice was caused to the minor, his guardian being present in Court at the time the application was presented and an assenting party thereto, there was nothing in the technical objection.

(*Thakur Umed Singh* v. *Rai Bahadur Seth Sobhag Mal* (*Viscount Haldane*) *P. C.* 67

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——S. 2.—" *Decree* "—*Order declaring suit abated for defendant's representatives not being brought on record in time—O. XXII, R. 4—Appealable—Practice—Final decree dismissing suit to be drawn up.*

An order declaring that the suit has abated by reason of more than 6 months having elapsed from the date of the defendant's death without his legal representatives having been brought on record is a decree, and is appealable.

On a suit or appeal abating a decree dismissing, the suit or appeal must, properly speaking follow.

Suppu Nayakan v. *Perumal Chetty.* (*Sadasiva Aiyar and Moore JJ.*) 483

——**Sec** 2, (12)—*Mense profits—Definition of—Damage due to withholding of possession—Right to—Defence that crops if sown could not be harvested at the time of delivery of possession to plaintiff, inadmissible—Specific Relief Act, S. 9—Mesne profits not to be decreed —C. P. C. S.* 11 *Expl.* 5 *and O.* 2, *R.* 2—*No bar to subsequent suit for mesne profits.*

A person wrongfully kept out of possession is entitled to recover not only the profits which the defendant could have made while in possession but also the loss that he (the plaintiff) has sustained by the withholding of possession. It is not a defence therefore, to a claim for the value of the crops that might have been raised on the land that the delivery to the plaintiff was at a time when even if the land was sown in due time, the crops would not have been ripe for the defendant to have harvested them.

In a suit under S. 9 of the Specific Relief Act, a decree for mesne profits cannot be made and as such, a subsequent suit for mesne profits will not be barred.

Thavasi v. *Arumugam.* (*Sadasiva Aiyer and Hannay, JJ.*) ... 323

——S. 11—Res judicata—*Judgment in connected suits—Appea against one and no appeal against others—Effect of—Judgment pending appeal or before appeal time expires—Provisional judgment and not* res judicata—*Judgment on mistaken view of* res judicata—*No bar*

A judgment pending appeal or for which the appeal time has not expired is only a provisional judgment and does not operate as *res judicata.*

The judgment in one connected suit cannot bar the hearing of the appeal from another.

The respondent filed S. S. 466 of '09 and S. S. 276 of '10 against the appellant to enforce acceptance of patta for faslis 1318 and 1319 respectively. The suits were disposed of on 26-3-1912. Appeals were filed against the judgments in the two suits on 17-6-1912. S. S. 412 of 1911 which was a suit to enforce acceptance of patta for fasli 1320, came on for hearing on 23-5-12. The decision in S. S. 276 of '10 was held to operate as *res judicata* and judgment was given accordingly. No appeal was filed against this judgment. When the appeal against judgments in S. S. 276 of '10 and S. S. 466 of '09 came on before the District Judge, he held that the decision in S. S. 412 of 1911 not having been appealed against was final and barred the hearing of the appeals. On appeal against the same.

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Held that the decision in S. S. 276 of '10 could not operate as *res judicata* in S. S. 412-11 as at the time of the disposal of the latter suit appeal time had not expired for the judgment in S.S. 276 of '10 and that the judgment in S. S. 412 of '11 which was not a decision on the merits but proceeded on a mistaken view of the law of *res judicata* could not bar the disposal of the appeal against S. S. 276 of '10 on the merits.

Chengalvala Gurraju v. *Madapathy Venkateswara Row.* (*Ayling and Kumarasami Sastri, JJ*). 379

———S. 11—Res judicata—*Mortgage—Suit for sale — Decree for sale—Subsequent suit for redemption barred.*

A suit for sale by the mortgagee (in which there has been a decree) bars a subsequent suit for redemption by the mortgagor who was a party to the suit. *Vedapuratti* v. *Vallabha Valiya Raja* (1901) I L R 25 M 300 Foll.

Ranga Aiyangar v. *Narayana Chariar.* (*Sadasiva Aiyar and Napier, JJ.*) 13

———S. 44—Cochin State—Jurisdiction — Submission to—What amounts to. *See* Private International Law 148

———S. 47—Execution sale—Setting aside application—Order rejecting —Appeal—Second appeal—Revision *See* Insolvency of Judgment-debtor... 611

———**S. 47 (Old Code—S. 244)**—*Objections—Execution—Decree—Suit —S. 88 and 89 of Transfer of Property Act of* 1882—*Mortgage.*

On March 29, 1888 one Bakhshi Ram Nawaz Singh obtained a decree for sale under Ss. 88 and 89 of Transfer of Property Act against Fakir Chand and others. On May 18, 1904 certain objections were raised against the execution of the said decree of Bakhshi Nawaz, by Amir Chand, the adopted son of Fakir Chand under S. 244 of Civil Procedure Code of 1882, some of which were disallowed ; on January 28, 1907 Amir Chand brought a suit raising the same objections as in 1904 making two other persons parties only to avoid the bar of S. 244 Civil Procedure Code, there being no foundation by reliable legal evidence for making new parties to the suit.

Held, that the suit was barred by S. 244 of Civil Procedure Code of 1882, *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal* (1892) L R 19 I A 166. approved.

Amir Chand v. *Bakshi Harihar Prasad Singh* (*Sir John Edge*) *P. C.* 238

———S. 52—*Legal representative—Duty to account for assets—Burden of proof—Profits also to be accounted for—Attached property—Non-existent right—Duty of Court—Transfer of Property Act, S.* 101—*Merger—Mortgagee becoming entitled to equity of redemption—No puisne incumbrance.* ...

The liability of a legal representative under S. 52 C. P. C. is not discharged until he accounts not only for the property that has come into his possession but also for the profits from the same:

Once it is proved or admitted that the legal representative sought to be made liable has come into possession of assets belonging to the estate of the deceased, it is for him to satisfy the court as to the extent of the assets received and to account for them.

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Where a mortgagee becomes by inheritance entitled also to the equity of redemption, a merger will take place, unless there are *puisne* incumbrances against whom he has to be protected.

Per Sadasiva Aiyar, J.—*Quaere* ; Whether a court is bound to sell attached property though the right attached ceased to exist long before attachment and is not entitled to stop the sale altogether.

Rajah of Kalahasti v. *Sree Mahant Prayag Dossjee Varu.* (*Sadasiva Aiyar and Moore, JJ.*) 391

———**S. 60** (*n*)—*Right to future maintenance—Whether attacheable in execution of decree—Appointment of receiver—Civil Procedure Code, S.* 51 (*d*), *O* 40, *R* 1.

A right to future maintenance is not liable to attachment in execution of a decree. Nor can a receiver be appointed in execution for realising such maintenance and applying it in satisfaction of the decree.

A receiver can be appointed in execution only in respect of property which has been the subject of attachment.

Palikandy Mammad v. *Chingoran Keloth Valia Appa* alias *Krishnan Nair.* (*Sadasiva Aiyar and Moore, JJ.*) 361

———**S. 92**—Scheme—Power of Court—Temple Subject to temple committee—Principles by which court is to be guided. *See* Religious Endowments Act, Ss. 3, 4. 29

———**Ss. 100, 115**—Execution sale—Setting aside—Application for—Order rejecting — Second appeal — Revision. *See* Insolvency of Judgment-debtor. 611

———**S. 110 (cl.) 1 and 2**—*Scope and applicability—Privy Council—Leave to Appeal—Grant of—Subject-matter of suit in Court of First Instance less than Rs.* 10,000—*Subject-matter in appeal more than Rs.* 10,000 *if mesne profits accrued due subsequent to suit and before application for certificate for leave are taken into account—Leave if can be granted.*

Where the value of the subject-matter was less than Rs. 10,000 in the Court of First Instance but the value of the subject-matter on appeal to the Privy Council exceeded that sum owing to the accrual of mesne profits during the period between the institution of the suit and the petition for a certificate, held that the appellants had not brought themselves within S. 110 of the Code and that leave to appeal to the Privy Council could not be granted.

Moti Chand v. *Ganga Prasad* (1901) L R 29 I A 40 applied.

Scope and applicability of clauses 1 and 2 of S. 110 considered.

Per *Srinivasa Iyengar, J*:—The words " the subject matter of the suit in the Court of First Instance " in clause 1 of S. 110 do not include mesne profits subsequent to the suit.

Subramania Aiyar v. *Sellammal.* (*Chief Justice and Srinivasa Aiyangar, J*) 317

———**S. 144**—*Scope of—"Decree reversed or varied"—Meaning—Supersession of decree by decree in separate suit—Restitution of amount recovered under superseded decree—Right to.*

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S. 144 of the Code of Civil Procedure is not confined to cases where restitution is claimed on the reversal of a decree in first or second appeal. Provided the decree is varied or reversed the section applies, however the reversal or variance has been effected.

Where an order in execution proceedings over-ruling the objection of the judgement-debtor to the recognition of the transfer of the decree sought to be executed and allowing execution by the transferee was superseded by a subsequent decree, declaring the invalidity of the transfer and restraining him for receiving payment passed in a suit instituted for that purpose by the judgment-debtor against the transferee. *Held* that the judgment-debtor was entitled under the circumstances, to apply under S. 144 for the recovery with interest of the amount received from him by the transferee in execution.

Shiam Sundar Lal v. *Kaiser Zamini Begam* (1906) I L R 29 A 148 doubted.

Subabrayudu v. *Seshasani.* (*Sadasiva Ayiar and Moore, JJ*) ... 366

——— O. 8 R. 6—Equitable set off—Plea of—Maintainability— Claim barred—Effect. *See* Practice 59

——— O. 8 R. 6—"*Equitable set-off*"—*Scope of doctrine—English and Indian Law—Mortgage—Assignment—Suit by assignee for sale—Right to set-off decree debt due by assignor—Transfer of Property Act S.* 132—*Applicability—Effect.*

In a suit on a mortgage by an assignee of the mortgage the mortgagor cannot claim to set off debts unconnected with the mortgage owing by the original mortgagee to him.

Where in a suit for sale brought by the assignee of a mortgagee the court below allowed a decree debt against the assignor to be set off against the claim by the assignee, *Held*, even assuming that there could be a set-off of the nature pleaded, such set-off could not be pleaded as an equity attaching to the rights of the assignee

Held, further that the assignment not being an actionable claim within the meaning of S. 132 of the Transfer of Property Act, the set-off could not be pleaded under that section also.

Scope of the doctrine of ' Equitable set-off" examined.

English Law reviewed.

Subramania Aiyar v. *Palasana Gramani.* (*Ayling and Napier, JJ.*)... 615

——— O. 21 R 36—Landlord and tenant—Disposition of tenant after being put into possession—Landlord's suit for possession—Form of decree. *See* Ejectment. 258

——— O 21, R. 103—No inquiry—No order—Symbolical delivery—Effect of. *See* Registration Act, Ss. 17 and 49 404

——— O. 22 R. 4—Order declaring suit abated deft's. representatives not brought on record in time. *See* C. P. Code, S. 2 486

——— O. 30, R. 1—Receiver—Appointment of, in execution—Only for property attached. *See* C. P. Code, S. 60 (n). 861

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——O. 40 R. 1—*Receiver—Power of—Terms of appointment—Madras Act II of* 1894, S. 15—*Nomination of karnam by receiver appointed by court—Validity—"Proprietor"—Court.*

The powers of a receiver appointed by the court depend upon the terms of his appointment (subject to any modification the court may from time to time make) but where general powers of management are conferred though subject to the control of the court, the receiver is as the person "in lawful management otherwise than as an agent, servant, mortgagee or lessee' the "Proprietor" and can validly exercise the power of nominating village officers vested in the "proprietor" under Act II of 1894.

Whatever the amount of the control exercised by the court on the receiver, the court cannot be said to be in management so as to be treated as the "proprietor."

Held, accordingly that a direction by the court that in case of nominations of village officers, court's sanction should be previously obtained did not justify the Collector in treating the court as the proprietor and serving notices or nomination on it and requiring appointments to be also made by it-

Secretary of State for India v. *Janardhana Rao*. (*Ayling and Phillips, JJ.*) 458

——O. 21, R. 63—*Unsuccessful claimant—Declaratory suit—Attaching decree-holders, defendants—Plea that sale was fraudulent under S. 53 of Transfer of Property Act—Validity—Fraudulent Sale—Remedy of persons defrauded—Representative action — Necessity—Judgment-creditors and ordinary creditors— Distinction—English and Indian Law—Judgment-creditors in England and India—Rights of—Distinction.*

Where, in a suit under O. 21 R. 63 C. P. C by a defeated claimant for declaration that he was the absolute owner of the suit property by right of purchase from the judgment-debtor and that it was not liable to be attached and sold in execution of the decree the decree-holders raised the plea that the sale-deed in favour of the plaintiff had been executed with intent to defraud creditors and was not valid as against him, *held*, that as the defendants had not sued to set aside the sale in favour of the plaintiff before they attached the properties in execution, they were not entitled to resist the claim of the plaintiff.

Per Seshagiri Aiyar, J.—Under S. 53 of the Transfer of Property Act it is open to any creditor to impeach a conveyance made by his debtor provided he alleges in the plaint that the sale was intended to defraud him and others similarly placed. A decree in such a suit will not give any personal right to the litigating plaintiff but would enure for the benefit of all creditors like himself. A representative action is not the only mode of setting aside the sale. But the conveyance is good and valid until it is so set aside and creditors have no remedy against the property sold until the sale is set aside. There is no distinction in this respect between a judgment-creditor and an ordinary creditor.

Distinction between the rights of a Judgment-creditor in England and in India pointed out.

C. P. Code.— (*contd.*) Page.

English Law reviewed.

Palaniandi Chetty v. *Appavu Chettiar.* (*Coutts Trotter and Seshagiri Aiyar, JJ.*) 565

———**O. 32 R. 7**—*Reference to arbitration pending suit without leave of Court—Voidable at the option of minors—Suit to declare decree not binding—Maintainability of—Compromise by father, not guardian* ad litem—*Voidable nevertheless—Exercise of option by minors to avoid—Effect on suit—Prior suit for partition—Re-opened with respect to all parties.*

A suit will lie at the instance of a minor party to a suit for a declaration that a decree passed in that suit in accordance with an award on a reference pending the suit cannot bind him as Court's leave was not obtained for the reference under O. 32 R. 7 C. P. C.

In a suit for partition in which present plaintiffs (minors) their brother and their father were, party defendants, they being represented by their brother as guardian *ad litem*, there was a reference to arbitration and a decree was passed in accordance with the award. The plaintiffs, their brother and their father appealed and pending the appeal, a compromise was entered into by the father which was recorded and made into a decree of Court. Leave of the Court was not obtained either for the reference or compromise.

Held, that both the original and the appellate decrees, were avoidable at the option of the minor plaintiffs and the effect of such avoidance was to re-open the suit for partition.

Held, further, that in the circumstances of the case, the suit was re-opened not only with respect to the plaintiffs but with reference to all the parties to the suit.

Vijaya Ramayya v. *Venkatasubba Rao* (*Ayling and Tyabji JJ.*) ... 465

———**O. 39 R. 2 (2) and (3), O. 44 R. 1 (r)**— *Temporary injunction—Disobedience—Order declining to arrest or attach—Appeal lies from—Application to commit while suit pending—Orders passed after dismissal of suit—Legality of—Order for imprisonment—Need not be made after an order of attachment.*

An appeal lies under O. 43 R. 1 (r) of the Civil Procedure Code against an order declining to order the arrest of a person for having disobeyed a temporary injunction.

Where an injunction was disobeyed and the application to commit was put in while the suit was pending, the fact that the suit was dismissed before orders were passed on the application does not affect the powers of the Court to take action for the breach of the injunction.

Under O. 39 R. 2 (3) the court is not bound to pass an order of imprisonment only after an order of attachment is passed.

Ottapurakkal Thayath Suppi v. *Sayid Alabi Masaber Koya Kunhi Koya.* (*Chief Justice, Abdur Rahim and Srinivasa Aiyangar, JJ.*) ... 523

———**O. 44 R 1 (r)**—Appeal against order declining to arrest of attach —Whether lies ... — ... 523

C. P. C.—(*contd.*) Page.

———**Sch. ii—S. 15 and 16**—Arbitration—Reference—Application to Court for—Omission of guardian—*ad litem* of minor to sign—Effect. *See* Arbitration 67

Civil Rules of Practice Rr. 240,241,242—Forms 22,94—Whether *ultra vires*—Guardian and Wards Act Ss. 7, 34, (a), 39 (e), 50 (b) and (d). 508

Company—Managing Director of Newspaper—Power to vary duties and hours of attendance of co-editor. *See* Presidency Small Cause Court's Act. S. 69 207

Contract Act—S. 55—Contract for sale of land—Specific performance—Time if and when of essence of contract—English and Indian Law. *See* Specific Performance. 186

———**S. 69, 70**;—Surety for negotiable instrument, without consent of drawer—Payment by, to payee — Liability of drawer to. *See* Principal and Surety. 369

———**S. 73**—Contract for sale of Negotiable securities—Breach—Damages—Meaning of. *See* Contracts 78

———**S. 140, 145**—Negotiable istrument—Surety for, without consent of drawer—Liability of drawer to, on payment by suerty—Contract Act Ss. 69, 70. *See* Principal and Surety. 369

———**S. 178**—Pledge of jewel—Pledge by agent for sale—Right of *bona fide* pledgee. *See* Limitation Act of 1908, Art 18. ... 587

Contract for sale of land—Specific performance—Time if and when of essence of contract—English and Indan Law *See* Specific Performance, ... 185

Contracts—*Shares—Negotiable security—Sale—Breach—Notice—Damages—Date of breach—Market price—Subsequent rise in price—Indian Contract Act, S. 73.*

Under six contracts A contracted with B to sell a certain number of shares on a certain date and in the event of B not buying them, A was to have the option to re-sell the shares by auction and recover from B any loss sustained. On the fixed day A offered the shares which had fallen in value to B and wrote to him adding "Failing compliance with this request by to-day our client will be forced to sell the said shares by public auction on or about the 2nd proximo and hold you responsible for all losses sustained thereby." The purchaser (B) wanted a sum which he claimed to be owing from the seller (A) to be set off against the price demanded and sent a cheque for the difference. The seller then repudiated the claim to the set off and replied "We have now to give you notice that our client intends to re-sell these shares and institute a suit against you for the recovery of loss which may result from that course." Thereupon the purchaser stopped payment of the cheque. Negotiations then ensued but ended in nothing. The seller then notified the purchaser of his claim to be paid the difference between the contract price and the market price, by way of compensation and on default of payment, an action was commenced in due course. The shares were sold piecemeal in the course of some months and the sales resulted in a profit.

Held, that in a contract for the sale of negotiable securities the measure of damages for breach was the difference between the contract price and the market price at the date of breach, that upon breach by the purchaser, his contractual right to the shares fell to the ground and the

Contract.—(*contd.*) Page.

stipulation for the re-sale was only a mode by which the seller might, if he thought fit, liquidate the damages, by ascertaining the value of the shares on the date of the breach ; that such a sale was not a sale on the purchaser's account, so as to impose on the seller an obligation to account to the purchaser for the price realised ; that in the present case the sale was not one in the exercise of that option ; that although a plaintiff who sued for damages was bound to take all reasonable steps to mitigate the loss caused by the breach and if he could do something or did something on the date of the breach which did or might have mitigated the damages the defendant would be entitled to the benefit thereof but the defendant could not claim the benefit of any subsequent speculation by the seller on his own account inasmuch as he could not be responsible for any loss from such speculation.

Held, further, that S. 73 of the Indian Contract Act was merely declaratory of the right to damages as enunciated above and that S.107 had no application in the present case.

Staniforth v. *Lyall* (1830 7 Bing 169: 131 E. R. 65.) *Yates* v. *Whyte* (1838 4 Bing N. C. 372 : 132 E. R. 793.) *Bradburn* v. *Gt. W. Ry.* (1874 L. R. 10 Ex. 1.) *Jebsen* v. *E. and W. India Dockc Co.*, (1875 L. R. 10. C. P. 300.) *Rodocanachie* v. *Milburn* (1886 18 Q. B. D. 67.) *Williams Brothers* v. *Agius Ltd.* (1914 A. C. 500 H. L.) approved.

Jamal v. *Moola Dawood Sons and Co.* (*Lord Wrenbury*) *P. C.* ... 73

Court Fees Act S. 7 Cl. (iv)—*Suit for accounts—Preliminary decree —Appeal by defendant against whole decree—Valuation.*

In a suit coming under S. 7 cl. (iv) of the Court Fees Act, when the plaintiff has valued the relief prayed for and obtained a decree, in this instance a preliminary decree for an account, and the defendant appeals against the whole decree, the latter is bound by the valuation in the plaint.

Samiya Mavali v. *Minammal* (1899) I L R 23 M 490; 10 M L J 240. approved.

Srinivasacharlu v. *Perindevamma.* (*Chief Justice, Sadasiva Aiyar, and Srinivasa Aiyangar, JJ.*) *F B* 402

Damages—Measure of—Negotiable security—Contract for sale of—Breach. *See* Contracts. 73

Deed—Power of Attorney—Construction—Power to borrow if includes power to pledge credit. *See* Agency 232

Dismissal—Validity—Office at pleasure —Notice—Necessity. *See* Religious Endowments. 274

Ejectment—*Landlord and Tenant—Dispossession of tenant after being put into possession—Landlord's suit for physical possession—Not maintainable—Decree for symbolical possession, appropriate relief— C. P. C, O. 21, R. 36.*

Where a tenant was dispossessed by a trespasser after he was put into possession.

Held, that the landlord could not during the currency of the lease sue for actual possession but might be given a decree for possession of his reversionary interest in the form indicated by O. 21 R. 36 C. P. C.

Sita Ram v. *Ram Dial* (1896) I L R 18 A 440. (F B) followed.

Thiruvengada Konan v. *Venkatachala Konan.* (*Sadasiva Aiyar and Napier, JJ.*) 258

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Ejectment suit—Maintainability—Contract to sell to A—Subsequent registered conveyance to B—Suit by A against B—B's purchase with notice of contract with A.—*See* Trusts Act S. 91 ... 559

Equitable set off—Plea of—Claim barred—Effect—*See* Practice. 59

——Scope of doctrine—English and Indian law—C P. Code of 1908, O. 8 R. 6—Mortgage—Assignment—Suit by assignee for sale—Right to set off decree left due by assignor—*See* C. P. Code O. 8 R. 6 ... 615

ESTOPPEL—*Exchange of immovable property—Unregistered instrument—Actings of parties—Part performance—Equitable estoppel—Transfer of Property Act, Ss. 51, 54, 118—Estoppel against statute—Compensation for improvements.*

Where the plaintiffs and the defendants by an unregistered instrument agreed for mutual convenience, to an exchange of certain plots of land forming part of their adjoining house sites and the defendants erected a costly building on the land which fell to them under that instrument, and the plaintiffs lay by, and acquiesced in, such construction and even received an additional amount from the defendants on the ground that the land that fell to the share of the latter was larger in extent and the plaintiffs sued the defendants in ejectment on the ground that the instrument did not pass title.

Held per *Wallis, C. J.* (*Seshagiri Aiyar, J.* dissenting).

The plaintiffs, by reason of the contract to exchange having been fully performed and having stood by and acquiesced in the defendant's building and received a further payment are estopped from ejecting the defendants. *Mc Manus* v. *Cooke* (1887) 35 Ch. D. 681 referred to.

Quære. Whether after *Mahomed Musa* v. *Aghore Kumar Ganguli* (1914) I. L. R. 42 C. 801=28 M. L. J. 548 the decision in *Kurri Veera Reddi* v. *Kurri Bapi Reddi* (1904) I. L. R. 29 M. 336=16 M. L. J. 395, is good law ?

Per *Seshagiri Aiyer J.* Where a statute enjoins that title would pass only if certain formalities are complied with, conduct and actings of parties cannot be relied on to supplement an inchoate title.

Kurri Veera Reddi v. *Kurri Rapi Reddi* (1904) I L. R. 29 M. 336=16 M. L. J. 395 is not affected by the decision in *Mahomed Musa* v. *Aghore Kumar Gonguli* (1914) I L R 42 C 801=28 M L J 548.

The plaintiffs are not estopped from ejecting the defendants, because no principle of equity or estoppel should be allowed to prevail against the plain and mandatory provision of law (Ss. 54 and 118 of the Transfer of Property Act). Where the law says that title can be acquired only in a particular way, there is no room for the application of the doctrine of estoppel.

The principle of S. 51 of the Transfer of Property Act applies to the present case and the plaintiff must pay substantial compensation determined on the extent of the damage likely to accrue to the defendants before the plaintiff is given a decree for possession..

Ramanathan Chetty v. *Ramasawmi Chetty.* [*Wallis C.J. and Seshagiri, Iyer J.*]

Evidence Act—**S. 92**—Registered lease-deed—Unregistred document executed on same date as lease deed and providing for cancellation and delivery of lease deed to lessor and for execution of release deed by

Evidence Act.—(*contd.*) Page
lessee—Suit by lessor for cancellation and delivery of lease deed and for execution of release deed by lessee—Admissibility of unregistered document in evidence. *See* Registration Act—S. 17 cl. (b) ... 302

Execution purchaser—*Bona fide*, stranger purchasing—Decree set aside on appeal—Does not affect sale—Knowledge of appeal, immaterial. *See* Indian Contract Act Ss. 216, 196,... 497

Execution Sale—Setting aside—Application under S. 4, C. P. C—Order rejecting—Second appeal—Revision—*See* Insolvency of judgment-debtor. 611

Foreign Court—Jurisdiction—Submission to—What amounts to—*See* Private International Law. 148

Fraudulent conveyance—*Transfer of Property Act of* 1882, *S.* 53—*To defeat or delay creditor—Preference of one creditor over another—Consideration—Debt—Benefit to debtor.*

Where no consideration of the law of bankruptcy applies there is nothing to prevent a debtor paying one creditor in full and leaving the others unpaid although the result may be that the rest of his assets is insufficient to pay his remaining debts.

Re Moroney (1888) L. R. 21 Ir 27. followed.

Where a transfer is made, for adequate consideration, in satisfaction of genuine debts, and without reservation of any benefit to the debtor it could not be impeached under S. 53 of the Transfer of Property Act.

Musabur Sahu v. *Lala Hakim Lal.* [*Lord Wrenbury*] (P. C.) ... 116

Fraudulent Transfer—Avoidance—Suit to set aside transfer—Necessity—Frame of. *See* C. P. Code O. 21 R. 63. 565

Grant—*Construction— Resumability — Grant burdened with service—Grant in lieu of wages—Distinction—Test—Grant of " Service Inam " —Services to be rendered only private—Reservation of Kattubadi to grantor.—Recital that grantee was to be rendering service so as to deserve patronage of Divanum—Effect.*

Where the point for decision was whether a grant was merely a grant in lieu of wages and therefore resumable at the will of the grantor or a grant of land burdened with service and therefore not resumable so long as the grantee and his heirs were ready and willing to render service and it appeared that (1) the grant was made to "Nakesh (decorator) Mrutyanjayudu, (2) the deed recited that the donee had rendered services in the past and that the said services were acceptable to the donor, (3) the lands were granted as Service Inam, (4) the grantee was, under the grant, to pay a fixed Kattubadi which was never enhanced during the 45 years during which the grantee and his heirs were in possession; (5) the grantee was, after the grant, to render services which would deserve the approbation of the divanum, (6) the grant was stated to be hereditary and the lands granted were held by the grantee and his heirs in the lineal line for 3 generations and (7) both prior and subsequent to the grant the grantees, services were recompensed by the same salary,

Held by *Seshagiri Aiyar and Phillips JJ.* (*The Chief Justice* dissenting) that the grant was a grant burdened with service and was not resumable so long as the grantee and his heirs were willing to render service.

Grant.—(*contd.*) Page.

The Chief Justice—The balance of authority in this Presidency is in favour of the view that Service Inams granted for services of a personal nature are resumable.

Per Seshagiri Aiyar, J.—The presumption in government grants that the lands granted as Service Inam are resumable is inapplicable to grants by Zemindars.

No general rule can be laid down, apart from other circumstances, that a grant for personal or menial services is liable to resumption.

A clause in a grant by a Zemindar that the grantee should be rendering service " so as to deserve the patronage of the Divanum" does not show that the grantee was to hold the lands during the pleasure of the grantor. It is suggestive only of the vain gloriousness of the grantor.

(*Mrutyunjaydu* v. *Raja of Pittapuram*) [*Chief Justice, Seshagiri Aiyar and Phillips JJ.*] (F. B.) 122

Guardian—Minor—Right to guardianship of person or property of minor wife or child—*See* Guardian and Wards Act, S. 25 21

Guardians and Wards Act, Ss. 7, 34 (a), 39 (e) 50 (b) and (d)—*Civil Rules of Practice, Rules* 240, 241. 242—*Forms*, 92, 94—*Preliminary order of approval of guardian*—*Approval of security and final appointment of guardian*—Ultra vires—*Order appointing guardian-Insufficient security*—*No appeal on insufficiency of security*—*Guardians and Wards Act, S.* 47 (*a*).

No appeal lies against an order by the District Court accepting a security furnished by the guardian under S. 34 (a) of the Guardians and Wards Act, on the ground of insufficiency or otherwise, such an order not being one comprised in S. 47 (a).

Gopammal v. *Sriniasa Aiyangar* (1914) 28 M. L. J. 96 followed,

Per Sadasiva Aiyar, J.:—(Moore J. dissenting) Rules 240 to 242 and forms 92 and 94 of the Civil Rules of Practice (Madras) so far as they require the appointment of the guardian to be postponed to the furnishing and approval of the security are *ultra vires*, as they are inconsistent with Ss. 7, 34 (a), 39 (e) and 50 of the Guardians and Wards Act.

The Act only contemplates, first the appointment of the guardian under S. 7, then his giving security if so required under S. 34 (a) and his liability to be removed under S. 39 (e) if he fails to furnish security contumaciously.

Per Moore, J.—The procedure prescribed in the Rules of Practice and forms and followed in the mofussil does not contravene any express provision in the Act and is not *ultra vires*, as the first order is an order of appointment of the guardian conditional on security being furnished.

Gopammal v. *Srinivasa Aiyangar*. [*Sadasiva Aiyar and Moore JJ.*] ... 508

————**S. 25**—*Application by father for custody of his child not previously in his possession*—*Mahomedan law*—*Majority under*—*Indian Majority Act*—*Effect of, on the age of, as to guardianship of person*—*Hindu Law*—*Manager of Hindu family*—*If minor can be guardian.*

A Mahomedan father applied under S. 25 of the Guardian and Wards Act that his minor son aged between 15 and 16 years who was in the custody of his mother during her life time and since passed into the custody of his maternal grandmother, might be handed over to him. It was contended that the section did not apply to the case and that even if

Guardian and Wards Act.—(*contd.*) Page.
it did, as the boy was above the age of minority under the Mahomedan law, the Court had no power to direct him to be made over to the father.

Held, that S. 25 applied not only to cases where the infant is removed from the custody of the guardian but to all cases where the guardian seeks to get possession of the infant whether he was antecedently in his possession or not.

Utma Kuar v. *Bhagwanta Kuar* [1915) I L R 37 A 515 followed.

Held, also: That having regard to the Indian Majority Act, the minor is not emancipated from the control of the guardian, whether in respect of his person or his property. till he attains the age of 18, *Readè* v. *Krishna* (1881), I. L. R. 9 M. 391 followed.

Per Sadasiva Aiyar, J. :—A minor cannot be the manager of a Hindu family or the guardian of the property or person of his minor wife or child.

Mohideen Ibrahim Nachi v. *Mahomed Ibrahim Shaib.* (*Sadasiva Iyar and Napier JJ.*) 21

High Court—Original Side—Costs—Fee paid to Advocate appearing with Vakil—Practice —*See* Letters Patent (Madras) cl. 12. ... 130

Hindu law—*Adopted son—Rights of—Suit for partition—Natural born son of one brother and adopted son of the other—Entitled to share, equally.*

As regards the distribution of family property by partition an adopted son stands exactly in the same position as he would stand if he were a naturally born son of his adoptive father subject to the qualification that if there be a competition between an adopted son and a subsequently born legitimate natural son of the same father, the adopted son takes a less share than he would take if he had been a naturally born legitimate son.

Held, accordingly, in a suit for partition of the family property between the adopted son of one brother and the natural born son of the other, that the former was entitled to share equally with the latter.

Raghubanund Doss v. *Sadhuchurn Doss* (1878) ILR 4 C 425 overruled.

Tara Mohun Bhuttacharjea v. *Kripa Moyee Debia* (1868) 9 W R 423, *Dinonath Mookerjee* v. *Gopal Churn Mookerjee* (1881) 8 C L R 57, *Raja* v. *Subbaraya* (1883) I L R 7 M 253, approved ; *Padma Coomari Debi* v. *The Court of Wards* (1881) L R 8 I A 229 referred to ... 193

Nagindas Bhugwandas v. *Bachoo Hurkisondas.* [*Sir John Edge.*] (P.C.)

——*Adoption—Widow—Consent of Sapindas—Of next in succession, essential—Exceptions stated—Authority to adopt—Lapse of time—Bar to the exercise of.*

Though no general rule can be laid down applicable to all cases, ordinarly the only persons with whose consent the widow can make an adoption are those next in the line of succession who are, in the eye of the law, her natural protectors and advisers and an adoption made with the consent of only one of the six nearest reversioners without consulting the rest was held invalid though the assent of all the more remote reversioners also had been procured.

The widow has no right on merely *a priori* reasoning, because the nearest reversioners are on inimical terms with her, to conclude that consulation with them would be of no use.

Hindu Law.—*(contd.)* Page.

Where there are only one of two near sapindas who from improper motives withhold their consent it may be open to the widow to apply to the more remote sapindas.

Quaere: whether mere lapse of time may not be a bar to the exercise of an authority to adopt given by the sapindas.

Courts will be justified in scanning with care an adoption which purports to be based on an authority given many years before the event.

Venkata Krishnamma v. *Annapurnamma* (1899) I. L. R. 23 M. 486. dissented from.

Suryanarayana v. *Venkataramana* (1903) I. L.R. 26 M. 681 approved *Mami* v. *Subbarayar* (1911) I. L. R. 36 M. 145 referred to.

Krishnayya v. *Lakshmipathy* (*Chief Justice and Seshagiri Aiyar*, J.) 265

———*Alienation by father of entire family property—One son in existence—Subsequently born son—Right of—Division in status—Limitation Act, Art.* 126—*Suit more than* 3 *years from date of plaintiff's brother's majority—Barred.*

In 1885, Plaintiffs father sold away the whole of his family property to one S. S. brought O. S. 21 of 1887 for possession of the property sold. A razinama decree was passed that on payment of certain amount within a certain time should give up his claims to the property but that in default of payment, possession should be delivered to him. Plaintiffs father failed to make the payment and S. got possession in 1899. In 1905, Plaintiffs brother who was in his mother's womb in 1885, at the date of the sale brought a suit to set aside the sale and got his third share. The present suit was brought in 1910 by the Plaintiff who was born in 1901, to get his share in the property.

Held (i) That the entire family property having been sold, in 1885 there was no property left in which the plaintiff could taken an interest by birth.

(ii) That Art. 126 applied to the claim and more than three years having elapsed since plainiff's brother attained majority, the suit was barred.

Per Sadasiva Aiyar, J :—(Moore, J. contra.) By the alienation in 1885, Plaintiff's father became divided in status from his son and the family was no longer joint family.

Assuming that plaintiff had a claim, it could not extend to more than a sixth.

Soundararajan v. Saravana Pillai (*Sadasiva Iyer and Moore, JJ*) 592

———*Dayabhaga School—Will—Indian Suecession Act of* 1865, *S.* 111 —*Testator's power—Widow's estate—Adoption—Construction.*

Where a Hindu by his will empowered his widow to adopt five sons one after the other in case of their demise and in the event of her dying without adopting or the adopted son predeceasing her without leaving any male issue, directed the estate after her death to pass to the sons of his sister and the widow dying after the adopted son who died without leaving male issue, the adoptive mother of the testator claimed the estate as against the nephews:

Held, that the gift in favour of the nephews took effect and was not affected by S. 111 of the Succession Act inasmuch as the event on the occurrence of which the distribution was to take place was the death of the widow.

Hindu Law.—(*contd.*) Page

Under the Dayabhaga Law a testator could lay down that his widow should in spite of an adoption to be made by her, remain in possession during her lifetime.

S. 111 of the Succession Act should be applied only to cases strictly coming within its scope.

(*P. C.*) *Bhupendra Krishna Ghose* v. *Amarendra Nath Dey* (*Mr. Ameer Ali*). 110

———*Guardian—Father—Power of, to appoint for person and property of minor son—Not for joint or trust property—Will—Burden of proof—* Thirumaligai—*Private property.*

A Hindu father can appoint a guardian to the person of his minor son but he cannot appoint a guardian for his property when the property is joint family property of the father and the son or trusts property.

Thirumaligais are private and not trust properties.

The burden of proving a will is on the party setting it up.

Alagappa Iyengar v. *Mangathai Ammangar.* (*Sadasiva Aiyar and Moore, JJ.*) 504

———*Illegitimate son—Impartible estate—Separate property of Zemindar—Succession to—Illegitimate son, share in—Pannai lands—Extension of—Accretion to estate.*

An illegitimate son succeeding to the separate estate of his father along with the widow is entitled to share equally with the widow.

Where lands within the Zamindari limits are purchased by the Zemindar and cultivated as pannai along with the other pannai lands of the estate, they become accretions to the Zemindar's interest in the Zemindari and pass on his death to the heir to the estate.

Viswanathaswami Naicker v. *Kamu Ammal.* (*Chief Justice and Srinivasa Iyengar, J*). 451

———Inheritance—Adopted son of one brother and natural son of another—Rights at partition of family property—*See* Hindu Law—Adoption. 193

——— Joint Family—Manager—Minor if can be—*See* Guardian and Wards Act S. 25 21

———Joint family—Partnership for family benefit between manager and stranger to family—Death of meaning member—Effect—*See* Partnership. 241

———Joint family—Self acquisition—Earning of single member—Presumption. *See* Hindu Law—Partition. 308

———*Mahomedan Law—Memons—Succession—Custom—Settlement—Succession Domicile—Analogy.*

Where a Hindu family migrate from one part of India to another, *prima facie* they carry with them their personal law and if they are alleged to have become subject to a new local custom, this new custom must affirmatively be proved to have been adopted; but when such a family emigrate to another country and being themselves Mahomedans settle among Mahomedans the presumption that they have accepted the law of the people whom they have joined is one that should be much more readily made and all that has to be shown is that they have so acted as to raise the inference that they have cut themselves off from their old environments.

Abdurahim Haji Ismail Mithu v. *Halimabai* (*Viscount Haldane*) *P.C* 227

Hindu Law.—(*contd.*) Page.

———Migrating family—Law applicable—Presumption—Hindu Law —Muhamedan Law. 227

———Partition—Adopted son of one brother and natural son of another—Rights of—*See* Hindu Law—Adopted son. ... 193

———*Partition—Suit to set aside by member who was minor at the time and was represented by a natural guardian—Proof—*Onus—*Family arrangements—Principles of—Applicability to partitions — Joint family—Member—Earnings of—Self-Acquisition—Presumption.*

A partition of the property of a joint Hindu family, some of the members of which are minors at the time and are represented by their natural guardians, is as binding on them as on the adult members, provided there is no negligence or fraud on the part of the guardians. In the suit by one of such minor members instituted after his attaining the age of majority to set aside the partition on the ground that it was unfair and prejudicial to his interest, the *onus* is on him to prove that it was unfair or prejudicial to his interests.

Principles applicable to family arrangements are applicable to partition among members of a joint Hindu family.

There is no presumption that the earnings of one member of a joint Hindu family belong to the family in the absence of any evidence that they were thrown into the common stock or that they were jointly made by all the members of the family.

Yechuri Ramamurthi v. *Yechuri Ramamma.* (*Coutts Trotter and Srinivasa Aiyangr, JJ.*) 308

———Partition—Unregistered deed in respect of movables and immovables—Declaration of division of status in—Effect. *See* Registration Act, Ss. 17, 49. 62

———Religious office—Right of Females —*See* Religious Office. ... 222

———*Reversioner—Burden of proof—Proof of relationship and non-existence of other heirs to the best of his knowledge—Burden of proving nearer relationship on defendant—Inheritance—Samanodaka—Confined to 14 degrees—Gotraja not preferred to Bandhu unless shown to be descended from common ancestor.*

It is incumbent on a plaintiff seeking to succeed to property as a reversioner affirmatively to establish the particular relationship which he puts forward and he is also bound to satisfy the court that to the best of his knowledge, there are no nearer heirs, but he cannot be expected to do anything more and it is for those whose who claim that their kinship is nearer to prove that relationship.

Secretary of State v. *Subraya Kanta* (1915) M. W. N. 962 followed.

Samanodaka relationship for purposes of inheritance does not extend beyond 14 degrees.

A gotraja can in no circumstances be preferred to a Bandhu when he is unable to trace his descent from a common ancestor.

Vaidynatha Dikshityam referred to.

Rama Rao v. *Kuthiya Kowndan* alias *Marappa Gounden.* (*Coutts Trotter and Seshagiri Aiyar, JJ*) 514

Hindu Law.—(*contd.*) Page.

———*Widow—Relinquishment by widow—Prior alienees—Not affected by.*

A Hindu widow cannot relinquish her estate so as to affect prior alienations by her which will be good for her life or until re-marriage. 260

Subbamma v. *Subrahmanyam.* (*Sadasiva Aiyar and Napier, JJ.*)

———Will—Construction—*See* Hindu Law—Dayabhaga School. ... 111

———*Will—Self acquired property—Verbal power to adopt—Widow—Testimony of—Unshaken in cross-examination—Probabilities—Practice—Point not argued in High Court.*

A sonless Hindu separated from his brothers and in possession of large self-acquired property, made a will by which he gave his widow his entire estate for life in the event of his dying without a son, and appointed several persons as executors. Subsequently the widow adopted a son of her husband's nephew (brother's son) alleging that she was verbally given power to adopt by the testator. Two points having been argued before the Trial Judge, *viz.*, (1) whether the adoptee could validly become the the testator's son by virtue of the will and (2) whether the widow had authority to adopt, the first point of which was not argued in appeal:

Held, reversing the judgment of the High Court, that having regard to the balance of testimony of five respectable persons not shaken in cross-examination, (though the widow was not called as a witness by either party) and the probabilities of the case, the widow was given power to adopt; *held*, further, that the first point not argued on appeal in the High Court could not be raised before the Privy Council.

Adwaitya Prasad v. *Baldeo Das* (*P. C.*) 635

Minor—Right to guardianship of person or property of minor wife or child—Right to managership of joint Hindu family—*See* Guardian and Wards Act, S. 25. 21

Indian Contract Act, Ss. 216, 196—*Principal and agent—Ratification—Purchase by agent on his own account and contrary to directions of principal—No ratification possible—Stranger execution purchaser—*Bona fides—*Meaning of—Knowledge of appeal pending—Immaterial.*

Purchase by an agent in execution of a mortgage decree in favour of his principal, on his own account and contrary to the directions of the principal cannot be taken advantage of by the latter under S. 216 Indian Contract Act nor ratified under S. 196.

Bona fide purchasers in execution of decrees (in this case, a mortgage decree) not being decree-holders are unaffected by the decrees being subsequently reversed.

A purchaser with notice of the pendency of an appeal is not on that account any the less a *bona fide* purchaser.

The meaning of the words "*bona fide* purchaser" considered.

Raghavachari v. *Pakkiri Mahomed Rowther.* (*Sadasiva Aiyar and Moore, JJ.*) 497

Indian Minority Act—Effect—Mahomedan Law—Majority age of, for purposes of guardianship of person. *See* Guardian and Wards Act S. 25. 21

Indian Succession Act S. 11—Applicability—Construction. *See* Hindu Law—Dayabhaga School. 110

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Insolvency of judgment-debtor--*Adjudication—Vesting order—Subsequent sale of judment-debtor's property in execution of decree obtained before insolvency—Validity—Objection of Official Receiver—Effect—Aplication to set aside—Order rejecting—Appeal—Revision—Civil Procedure Code, Ss. 100, 115—Provincial Insolvency Act, Ss. 34, 35—Effect—Execution sale—Application to set aside—Order on—Appealability—Civil Procedure Code, S. 47, O. 21 R. 90—Effect.*

An execution court is entitled to set aside a sale on an application under S. 47, of the Code and no separate suit will lie for that purpose.

It is only when O. 21 R. 90, as well as S. 47, of the code applies to the petition to set aside an auction sale that no second appeal lies under S. 100 of the code. But where S. 47 alone is applicable to the petition, the order passed thereon is a decree and a second appeal lies.

Where, after a judgment-debtor had been adjudged an insolvent and after his property had vested in the Official Receiver, a portion thereof was sold in execution of the decree obtained before the adjudication notwithstanding the objection of the Receiver.

Held, on an application by the latter to set aside the sale.

1. That at the time of the sale the judgment-debtor had no right, title or interest which could be sold or vested in a purchaser;

2. That a purchaser with notice that the judgment-debtor had been declared an insolvent aquired no title under the sale:

3. That the omission on the part of the Official Receiver to give the notice specified by S. 35 of the Provincial Insolvency Act did not affect the case:

4. That the sale was altogether irregular and that the Court in holding the sale after it had been brought to its notice that the judgment-debtor had been adjudged an insolvent acted, if not without jurisdiction at any rate with material irregularity in the exercise of its jurisdiction within the meaning of S. 115 of the Code.

5. That the order rejecting the application was a decree and a second appeal lay against it.

Meaning of "purchaser in good faith" in S. 34 Sub-cl. (3) of the Provincial Insolvency Act.

Anantharama Iyer v. Kuttimalu Kovillamma (Sadasiva Aiyar and Moore, JJ.) 611

——— Trust created by debtor in favour of some of the creditors for discharge of debts—Transfer in good faith and for valuable consideration.—Transfer valid. *See* Provincial Insolvency Act—Ss. 4 (a), 18, 190, 36. 415

Jaghir—Meaning of—Madras Estates Land Act, S. 3 Sub-Sec. 2 cl. (c) (d). 600

Jodi payable by Inamdar—*Right of Zemindar or Mittadar under his sannad—Extent of—Jodi if a charge on interest of Inamdar—Assignment of jodi as such—Distinction.*

A Zamindar or Mittadar, who under his sannad has a right to collect the jodi payable by an Inamdar, has no charge for arrears of jodi on the interest of the Inamdar.

Per Seshagiri Aiyar, J.—If what is assigned is the *jodi* as such, the assignee would have a first charge although he may not be entitled to have all the statutory remedies which the assignor has.

Subbaraya Goundan v. Ranganatha Mudaliar. (Chief Justice and Seshagiri Aiyar, J.) 387

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Judgment creditors in England and India—Rights of—Distinction. *See* C. P. Code, O. 21 R. 63. 565

Land Encroachment Act (Madras III of 1905)—Applicability in construing Madras Irrigation Cess Act of 1865. *See* Madras Irrigation Cess Act of 1865 163

Landlord and Tenant—Dispossession of tenant after being put into possession—Landlord's suit for possession—Form of decree. *See* Ejectment. 251

————Suit for rent—Tenant's claim for damages for obstruction in previous years—Plea of equitable set off—Sustainability—Claims barred—Effect—*See* Practice 56

Lease—*Covenant for quiet enjoyment—Breach—Suit for damages for—Limitation—Cause of action—Limitation Act of* 1908, *Arts.* 115, 116 *—Applicability—"continuous breach"—Meaning and illustration—Transfer of Property Act, S.* 108*—Principle of—Applicability to Crown grants—Nature and scope of covenants provided by—Limitation Act of* 1908, *S.* 19*—Acknowledgment—Ambiguity in admission—Effect—Government and its servants—Acknowledgment by latter, if and to what extent binding on Government.*

Where the plaintiff, the lessee from the Government of a piece of land under a lease dated March 1896, for a period of 5 years, sued the Secretary of State on 11th March 1903 for damages sustained by him by reason of the Government's failure to put him in possession of a portion of the lands leased and it appeared that as early as 2nd July 1896 the plaintiff had demanded possession of that portion from the Government and failed to obtain it, *held* that limitation began to run from the time when the plaintiff became entitled to possession, *i.e.*, from the date of the lease or at the latest from the 2nd July 1896 when he demanded possession from the Government and failed to obtain it and that the suit was barred.

Held, further, that a memorandum to the plaintiff from the Tasildar (*a*) communicating the order of the Collector stopping the collection of the kist due for the portion of the land not obtained by the plaintiff pending the disposal of the dispute regarding it and (*b*) demanding payment of the balance of the kist due by him did not amount to an unequivocal admission by Government that, as they had failed to give possession of a portion of the demised property, they were liable at least to remit a portion of the rent and was not an acknowledgment within the meaning of S. 19 of the Limitation Act.

Per *Coutts Trotter, J*: The nature of the remedy available to a tenant under the covenant or the contract for quiet enjoyment depends upon the nature of the breach. The test as to whether a breach is continuous is this; if the plaintiff sues in damages, can he only sue for the damages actually accrued at the date of suit, or may he sue for the whole of the damage accrued and prospective, that the breach will cause to him. In the former case, the breach is continuing; in the latter, it is single and final. The failure of a lessor to give possession of the demised lands to his lessee goes to the very root of the contract and is so fundamental a breach of it as to entitle the lessee to treat that breach as final, and bring an action forthwith for the whole of the prospective damages.

Lease.—(*contd.*) Page.

Per *Srinivasa Aiyangar*, *J.*—The covenant or the contract, express or implied, to place the transferee in possession operates in *presenti* and that obligation is broken once for all as soon as the transferor declines or is unable to place the transferee in possession. In the case of a lease the obligation is to place the lessee in possession in the beginning of the term. On the breach of this obligation the lessee is entitled to institute an action and recover by way of damages the value of the term. The covenant or contract is not a continuing one and so there cannot be a continuing breach.

The technicalities of English law as to covenants ought not to be imported into India.

Nature of covenants provided for by S. 108 of the Transfer of Property Act discussed.

Though the provisions of the Transfer of Property Act do not apply to Crown grants, the provisions of S. 108 of the Transfer of Property Act may be referred to for the purpose of determining the nature of the ordinary covenants by which the lessor and the lessee are bound.

Secretary of State for India v *Venkayya Garu.* (*Coutts Trotter and Srinivasa Aiyangar, JJ.*) 575

Legal representative—Duty to account for assets—Burden of proof-Duty extends to profits. *See* Civil Procedure Code, S. 52.... ... 891

Letters Patent (Madras) Cl. 12—*Suit for land or other immoveable property—Damages for cutting trees on lands outside Madras—Practice—Original Side—Costs—Fees paid to advocate appearing with Vakil—Cannot be allowed against opposite party.*

A suit for damages for cutting and carrying away trees on land outside the local limits of the ordinary civil Jurisdiction of the High Court "is a suit for land or other immoveable property" within the meaning of Clause 12 of the Letters Patent.

On the Original Side a party who is represented by a counsel instructed by a Vakil has no right to recover from the opposite party as part of the costs of the suit, the fees paid to the counsel.

Srinivasa Aiyangar v. *Kannappa Chetty.* (*Chief Justice and Seshagiri Aiyar, J.*)... 123

Libel—*Fair comment—Statement of fact and comment—Well founded criticism—Meaning of—Statement of facts unessential—May be identified by reference.*

Even a statement of fact may be excused if honest and fair, as comment if it appears to be a deduction or conclusion come to by the writer from the facts stated or referred to by him or in the common knowledge of the person writing and those to whom the words are addressed provided the conclusion is one that can be reasonably come to on the facts.

For the plea of fair comment to be available, it is not necessary that the facts on which the inference is based should be specially stated; it is sufficient if those facts are identified by clear reference.

Whether a particular statement is a statement of fact or is a comment, is a question of fact to be determined with reference to the circumstances of each case.

Libel.—(*contd.*) Page.

The statement that criticism must be well-founded, means no more than that it must be such that a fair minded man might upon the facts *bona fide* hold the opinion expressed.

The Madras Times, Ltd. v. *Rogers.* (*Chief Justice and Phillips, J.*) 294

Limitation Act, S. 7—Hindu Law—Joint family—Alienation by father —Suit by after-born son to set aside—Limitation—Prior suit by elder brother, Effect of. *See* Hindu Law 592

———S. 14—*Pendency of former suit—Relief not granted because present plaintiffs were defendants—Time taken by prior proceedings deducted—Benami—Test—Source of consideration.*

In a suit by the descendants of one Gurucharan Sen by one of his sons for their share in certain properties which they alleged belonged to him but were collusively declared by their uncles with a view to protect them from their creditors, in what was styled "a deed of covenant" to belong to their mother, the wife of Gurucharan Sen, and were subsequently assigned on trust by her to some only of her descendants to the exclusion of the rest; the descendants of G by another of his sons prayed that their shares also might be determined and assigned to them in the same suit and their claim was accordingly decreed by the First Court; but on appeal, that decree was cancelled on the technical ground that as they were only defendants in the case, no decree could be passed in their favour and their right, could be determined only by a separate suit. On their so doing, they were met by the plea of limitation more than 12 years having elapsed from the deed of the covenant and the deed of trust.

Held, that the " deed of covenant" in no way altered the title of the parties as it did not purport to transfer any right but only contained an admission of a right which did not exist, that time began to run after the execution of the deed of trust when the trustees began to collect the rents to the exclusion of their co-heirs but that the time taken by the previous litigation when they were *bona fide* litigating for their rights should be deducted.

Their Lordships regretted that in the previous litigation the Appellate Court did not exercise the powers which they possessed under the Code of Civil Procedure to transpose them from the category of defendants to that of plaintiffs and to maintain the decree of the Court of the first Instance.

Where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the real test is the source whence the consideration came but where owing to distance of time evidence is not forthcoming on either side to establish or rebut conclusively the allegation, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts.

In this case, where one of the properties concerned was the family dwelling house and the properties were repurchased in the name of the wife and there was no evidence that the wife had any money of her own, while the husband though an insolvent had money and there was also motive for purchase *benami* in the name of the wife, without discussing how far these circumstances standing by themselves would have been sufficient to outweigh the ostensible title.

Limitation Act.—(*contd.*) Page.

Held: that from these circumstances taken along with the proved fact that the income of the properties was treated exactly like the income of other admitted family properties being entered in the family accounts and applied towards the expenses of the family the inference was irresistible that the property was acquired *benami* in the name of the wife and that inference was not rebutted by the fact that she executed mortgages or that she purported to dispose of the properties by will, both of these circumstances being explicable on the basis that the properties were family properties.

Srimati Nrityamoni Dassi v. *Lakhon Chunder Sen* (*Ameer Ali*) *P. C.* 429

———**S. 19**—Acknowledgment—Ambiguity — In admission—Effect—Government and its servants—Acknowledgment by latter if and to what extent binding on Government. *See*. Lease. ... 575

———**S. 22,**—*Suit by individual without indicating suit to be on behalf of Company—Amendment subsequently—Not adding new plaintiff.*

Where the plaintiff in the original plaint did not say that he was suing on behalf of a Company but on objection being taken by the defendant he stated that he was agreeable that the decree should be in favour of the company and the plaint be amended so that the suit might proceed as being instituted on behalf of the Company.

Held, that the case was not one of adding a new plaintiff within the meaning of S. 22 of the Limitation Act and the suit being in time at the date of the original institution was not barred though at the date of the amendment the limitation period had expired.

Muthukrishna Pillai v. *Rajam Aiyangar* (*Abdur Rahim and Spencer, JJ.*) 57

———**Art. 11**—Order of symbolical delivery of possession without enquiry—Limitation. *See* Registration Act, Ss. 17 and 149. ... 407

———**Art. 48**—*Agent for sale, in possession of jewel—Pledging—Applicability of—Pawnee in good faith from—Contract Act*, S. 178—*Right to be paid the amount of the pledge.*

On 19-5-07 plaintiff entrusted a jewel to one K who undertook to sell it on commission. The latter instead of selling the jewel pledged it with the defendant on 20-5-07. On 15-12-09 plaintiff came to know of this and in 1911, sued to recover the jewel or its value from the defendant.

Held, that Art. 48 of the limitation Act applied to the case and time began to run only from 15-12-08 when plaintiff came to know that the jewel was in defendant's possession.

Held, further, that the defendant being a pawnee in good faith from a person lawfully in possession of it was entitled to be paid the amount of the pledge under S. 178 of the Indian Contract Act.

Seshappier v. *Subramania Chettiar*. (*Sadasiva Aiyar and Moore, JJ*)... 587

———**Art. 59, 60**—*Deposit meaning of—Money entrusted by agent with firm—Nature of—Article applicable.*

Where money belonging to plaintiff was left with the defendant's firm on the understanding that interest should be paid on it at the current

Limitation Act.—(*contd*) Page.

rate and that the plaintiff should be at liberty to draw against it, as he required money.

Held, that it was a case of deposit to which Art. 60 applied.

Money in the hands of a trader who is not a banker will be a deposit in circumstances such as would make it money of a customer where the depositee was a banker.

Subramanian Chettiar v. *Kadiresan Chettiar.* (*Ayling and Napier, JJ.*) 245

———**Arts. 62 and 120**—*Receipt of money by manager of Jaghir—Suit for account by person entitled to a share of income—Limitation—Civil Procedure Code, O.* 2, *R.* 2—*Return of plaint in first suit for presentation to proper Court—No re-presentation—Subsequent suit, if barred.*

Art. 62 of the Limitation Act applies only to cases where a definite sum of money had been received by the defendant, which the law says he must hold for the use of the plantiff. It has no application to a case where the defendant is sought to be made liable not only for what he actually received but also for what he failed to receive owing to his default.

A suit against the defendant who had been appointed manager of a Jaghir with power to collect rents and with a liability to pay over what was due to the plantiff's share after deducting legitimate expenses, for an account of the profits received by him but omitted to be paid to the plaintiff, is a suit for account falling within Art. 120 of the Limitation Act.

Muhammad Habibullah Khan v. *Safdar Hussain Khan* (1884) I. L. R. 7 A. 25 followed.

Vydianatha Aiyar v. *Aiyasawmy Aiyar*, (1908) I.L.R. 32 M. 191=19 M. L. J. 94. *Mahomed Wahib* v. *Mahomed Ameer* (1905) I. L. R. 32 C. 527. *Segu Chidambaramma* v. *Segu Balayya*, (1911) 2 M. W. N. 467 distinguished.

O. 2 R. 2 of the Civil Procedure Code is no bar to a subsequent suit if the plaint in the former suit had been returned for presentation to the proper Court and was not re-presented.

Subba Row v. *Rama Row* (*Abdur Rahim and Srinivasa Aiyangar, JJ.*) 341

———, **Art. 80**—*Promissory note payable on demand—Writing fixing time—Suit by payee—Limitation after expiry of period—Covenant not to sue for limited time—Plea in bar to action.*

Where a promissory note payable on demand was accompanied by writing fixing a period for payment.

Held, that the suit by the payee was governed by Art. 80 of the Limitation Act and time began to run on the expiry of the time fixed.

A covenant not to sue for a limited time may be pleaded in bar to an action brought in contravention of the same. *Simon* v. *Hakim Mahomed Sherif* (1891) I. L. R. 10 M. 368 *Somasundaram Chettiar* v. *Narasimha Chariar* (1905) I. L. R. 29 M. 212 overruled.

Annamalai Chetty v. *Velayuda Nadar.* [*Wallis, CJ Abdur Rahim and Seshagiri Aiyar, JJ.*] 51

———**Art. 106**—Applicability. *See* Partnership. 241

Limitation Act.—(*contd.*) Page.

————**Arts.** 115, 116 — Applicability — Lease— Covenant for quiet enjoyment—Breach—Suit for damages—Limitation —Cause of action. *See* Lease. 575

————**Art.** 120, 62—*Suit for partition—Mortgage-debt collected by co-heirs—Mahomedan Law—Right of suit from day to-day.*

In a suit for partition by a Mahomedan lady against her co-heirs one of the reliefs claimed was in respect of the amount of a mortgage-debt due to the deceased collected by the defendants more than 6 years before suit.

Held, that Art. 120 and not Art. 62 applied to the case and as the right to sue accrued from day to-day, the action was not barred... ... 104

Abdul Rahiman v. *Pathummal Bivi* [*Sadasiva Aiyar and Napier, JJ*].

————**Art.** 126—Hindu Law—Joint family—Alienation by father Suit to set aside, after-born son—Limitation. *See* Hindu Law ... 592

————**Art.** 182, Cl. 5, 6—Issue of notice on application not in accordance with law—Saves limitation—Liberal construction of article. *See* Res Judicata. 460

Madras Estates Land Act (I of 1908) S. 3 sub-sec. 2 Cl. (c) (d)—*Jaghir Meaning of Grant for subsistance of Nawab of Carnatic—Not Jaghir, only inam—Acquisition of Kudivaram—Effect of—'Recognised—Meaning of.*

Held, that a grant forsubsistence made by the Nawab of Carnatic to a Member of the family, though styled a Jaghir, was only an inam coming within S. 3 Sub-Sec. 2 Cl. (d) of the Estates Land Act.

The origin and nature of Jaghir tenure discussed.

Where before 1843, both the Kudivaram and the Melvaram in an inam village had become vested in the Inamdar and no occupancy right had been acquired since.

Held, that an action to evict a tenant of such lands was maintainable in Civil Courts.

Per Srinivasa Aiyangar, J.:—Recognition of an inam within the meaning of S.3 Sub-Sec. 2 Cl. (d) implies something more than mere acquiescence, something done by the Government as for instance by acceptance of service, Jodi &c.

G. *Sam* v. *Ramalinga Mudaliar* (*Coutts Trotter and Srinivasa Aiyangar, JJ.*) 600

————**Ss. 3, 2 (d) and (e) and 8**—*Exception—Scope of—Estate—'Person not owning the* kudivaram *thereof meaning—Ejectment—Suit for—Jurisdiction—Civil Revenue Court.*

An *agraharam* granted by a Zemindar from out of his estate and situate within the Zemindari limits, was excluded from the assets of the Zemindari at the time of the permanent settlement and was subsequently enfranchised at the Inam Settlement.

Held, that the *agraharam* was not an estate within the meaning of S. 3, (2) (e) of the Estates Land Act.

To remove a village from the definition of estate within the meaning of S. 3, 2 (d) of the Act, it is necessary that the grantee should at the time of the grant own the *kudivaram* of all the lands then brought under cultivation. In other words, a village will not cease to come under that

Madras Estates Land Act.—(*contd.*) Page.

clause merely because the grantee owned the *kudivaram* in certain lands included therein even in so far as those lands are concerned.

The exception to S. 8 of the Estates Land Act has reference only to cases where a person who is already an Inamdar acquires the *kudivaram*. right

Sri Raja Varadaraja Appa Rao Garu v. *Katnani Kuruvanna, (Abdur Rahim and Ayling, JJ.)* 249

Madras Irrigation Cess Act, (VII of 1865)—*Land Encroachment Act (Act III of 1905—Government river, meaning of—Government not owner of banks or bed of river—Engagement—Inference of.*

Where admittedly the Government did not own the banks or any part of the bed of the river until far below the point where the plaintiff's channel took off.

Held, that the river was not a river belonging to the Government so as to warrant the levy of water cess under Act VII of 1865.

Per Wallis, C. J.:—The balance of authority is against the extreme view taken by Miller and Munro, JJ., in *Mahalakshmi* v. *Secretary of State for India* (1910) I. L. R. 34 M. 295=20 M. L. J. 823 that the effect of Act III of 1905 was to vest all running water in the Government because there was no other owner. Construing Act VII of 1165. this much is clear that at places where the whole bed of a river belongs to Government, it is a river belonging to Government and at places where no portion of the bed belongs to Government, it is not a river belonging to Government.

It was the clear intention of the legislature that the provisions of Act III of 1905 should be sued in construing Act VII of 1865.

Per *White, C. J. and Oldfield, J*:—In the circumstances of the case, their Lordships refused to infer from the fact that the Government did not seek to levy a separate tax from 1865 to 1907, that there was when the Act (VII of 1865) came into force a subsisting engagement between plaintiff and the Government within the meaning of the Act.

Per *White, C. J.*:—The engagement referred to in the Act is a subsisting engagement at the time that the Act came into force though acts or omissions since the Act might be evidence of such an engagement.

Secretary of State for India v. *Maharajah of Bobbili (Cheif Justice and Seshagiri Aiyar, J.)* 163

Madras Land Encroachment Act (III) of 1905 ; Ss. 5, 6, 7, and 14—*Notice under S. 7, if gives rise to a cause of action—Specific Relief Act S. 42. Suit for declaration—Limitation.*

A notice under S. 7 of the Madras Land Encroachment Act calling on the person in occupation to show cause why he should not be proceeded against under S. 5 or S. 6 of the Act, does not give rise to a cause of action.

Narayana Pillai v. *Secretary of State* (1912) 23 M. L. J. 162. approved.

Where matters proceed further and penal assessment is levied, a suit brought for declaration of title to the disputed land is governed by the six month's limitation prescribed by S. 14 commencing from the date of the levy of the penal assessment.

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Madras Land Encroachment Act.—(*contd.*)

The Secretary of State for India v. *Illikkal Assan.* (*Chief Justice, Abdur Rahim and Seshagiri Aiyar, JJ.*) F. B. 255

———**Act III of 1905**—Effect of 163

Mahomedan Law—Majority—Age of—Indian Majority Act—Effect as to guardianship of person. *See* Guardian and Wards Act, S. 25. ... 21

———Partition Suit—Mortgage debt collected by one of heirs—Claim in respect of—Limitation—Starting point. *See* limitation Act, Arts. 120, 62. 104

Maintenance, future, Right to—Cannot be attached in execution of decree —Civil Procedure Code, S. 60 (n). 36

Malabar Tenants Improvements Act (**Act I of 1900**) **Ss. 15, 6 (3)**—*Re-valuation of improvements—Government notification reversing rates —No ground for.*

Neither S. 15 nor S, 6 (3) of the Malabar Tenant's Improvement Act allows a re-valuation of improvements unless, since the last valuation, there has been a change in the condition of the improvements or additional improvements have been effected.

Held, accordingly, a revision of rates on the basis of a Government notification published since the date of the decree was unauthorised.

Veluthamana v. *Pathuma* (1913) 17 I. C. 131 followed.

Kunhammad Kutti v. *Panchara Alleema* (*Sadasiva Aiyar and Napier*) *JJ.*) 203

Maxim—Actionam deci non receipt lex.—Application. *See* Mortgage ... 607

Merger—Transfer of Property Act, S. 101—Motgagee becoming entitled by inheritance to the equity of redemption. 391

Mesne profits—Assessment—Principle—Loss sustained by plaintiff if can be allowed. *See* C. P. Code. S. 2 (12). 326

Mortgage by conditional sale—Mortgage, before the act—Absence of words of conveyance, effect of—Mortgagee, right of, to remedies given by S. 67 of the Transfer of Property Act. *See* Transfer of Property Act Ss. 2 (c), 58 and 67. 338

Mortgage—Construction—Mortgage by conditional sale—Mortgage before the Transfer of Property Act—Absence of words of conveyance—Effect of. *See* Transfer of Property Act S. 2, (c), 58 and 67. ... 338

———Equity of redemption—Acquisition by prescription—Sale of property for non-payment of public charges—Purchased by trespasser—Effect of mortgage. *See* Transfer of Property Act, S. 65 (c). ... 331

———Extinguishment of—Acquisition of title by prescription against Mortgagor—Acquirer defaulting to pay revenue—Revenue sale—Purchase by acquirer—Mortgage extinguished. *See* Transfer of Property Act, S. 65 (c). 331

———*Prior mortgagee—Suit by, without impleading puisne mortgagee —Purchaser under the decree—Rights and liabilities of, or against a puisne mortgagee, suing subsequently on his mortgage—The right of the latter not merely to redeem the prior purchaser but extends to selling the property subject to prior mortgage*—Lis pendens.

Where a prior mortgagee brings a suit on his mortgage without impleading the puisne mortgagee and purchases the property in execution of his decree; and the puisne mortgagee subsequently sues for sale on his mortgage against the prior mortgagee purchaser, the puisne mortgagee is

Mortgage.—(*contd.*) Page

entitled to a decree for sale of the property subject to the prior mortgage or if the prior mortgagee purchaser consents to a sale of the property free of incumbrances, the amount of each incumbrance to be paid in the order of the incumbrances. The puisne mortgagee is not bound to redeem before bringing the property to sale.

Mulla Vittil Seethee v. *Achudhan Nair* (1911) 21 M. L. J. 213 followed.

Venkatagiri v. *Sadagopachariar* (1911) 22 M. L. J. 129 *Venkatanarasammah* v. *Ramiah* (1819) I.L.R. 2 M. 108. *Ramayya Chettiar* v. *Parthasarathi Naicker* (1900) I. L. R. 24 M 171. dissented from.

Per *Srinivasa Aiyangar, J.* The rights of prior and the puisne mortgagees and the purchasers in defectively framed suits discussed. The cases on the question reviewed.

Chinnu Pillai v. *Venkatasamy Chettiar.* (*Coutts Trotter and Srinivasa Aiyangar, JJ.*) 347

——*Transfer of Property Act, S.* 83, 84—*Deposit —Payment of batta for proper address—Interest stops will*—Bona fide *mistake in amount —No mesne profits—Interest for the day of deposit.*

When the mortgagor pays the amount due upon the mortgagee into court and pays batta for notice with the porperty address of the mortgagee, he has done all that has to be done by him and thereafter interest ceases to run.

Where there are conflicting right as between subject and subject, fraction of a day will be treated as a who e day and the mortgagor is bound to pay interest for the day on which he makes deposit

Where the money deposited under S. 83 was short by 9 pies owing to a *bona fide* mistake on the part of the mortgagor.

Held, that he was not entitled to mesne profits as his tender was insufficient.

Subbai Goundan v Palani Goundan (*Sadasiva Ayair and Moore, JJ.*) 607

——Decree for sale—Subsequent suit for redemption—Res judicata. *See* C. P. S. 11 13

Negotiable Instruments—Promissory note—Suit on covenant not to sue for limited time if can be pleaded in bar. *See* Limitation Act—Art. 80 51

Newspaper—Managing Director—Power to vary duties and hours of attendance of co-editor—Absence of express contract as to duties of co-editor—Effect. *See* Presidency Small Cause Courts Act, S. 69 207

Notice—Necessity—Office at pleasure—Dismissal without notice. *See* Religious Endowments. 274

Partnership —*Dissolution— Hindu Law—Joint Family — Partnership for family benefit between manager and stranger to family—Death of managing member—Effect—Limitation Act of 1908—Art.* 106—*Applicability.*

Though, where the manager of a joint Hindu family is a member of a trading partnership, there may be many cases in which the family property may in one way or other be available to the creditors of the partnership, yet the family such is not a partner and the partnership, is dissolved on the death of the manager.

Partnership.—(*contd.*) Page.

Sokkanadha Vanni Mundar v. *Sokkanadha Vanni Munder* (1904) *I. L. R.* 28 *M.* 344 followed ; *Joopudy Sarayya Lakshmanaswamy* (1913) *I.* 36 *L. R.* M 185=25 M, L. J. 128 P. C. explained.

Ramanathan Chetty v. Yegappa Chetty; *Coutts Trotter and Srinivasa Iyengar, JJ.*) 241

Part performance—English Law doctrine of—Applicability to cases governed by Transfer of Property Act. *See* Estoppel. ... 1

Permanent Settlement—*Land comprised in—Ryoti land—Agreement by Zamindar with Government to hold on ryotwari patta—Validity of—Suit for rent—Jurisdiction.*

The holder of a partible Zamindary, may valid by agree with the Goverment to hold ryoti lands comprised in his sunnud on ryotwari tenure provided that no existing rights of any person in the land are thereby affected ; And the lands then cease to form part of the permanently settled estate.

Where the holder of a partible Zamindari let ryoti lands for a term till 1904 and he then agreed with the Government to hold there lands on ryotwari tenure, a suit for rent against the tenants of those lands lies in the Civil Court, and not in the Revenue Courts.

Per Sadasiva Aiyar, J.—The Zamindar is entitled to the full enjoyment of every parcel of the lands within the Zamindari and it is for the party who sets up the Goverment's right to resume and assess any portion of land lying within the limits of the Zamindary to prove it.

Sri Raja Varadaraja Appa Rao v. Gonepalle Punnayya (Sadasiva Aiyar and Napier, JJ). 515

Pleadings — Proof — Variance between—Suit on promissory note—Variation of date during trial — Irregularity—Principle one of circumstances, not of law. *See* Practice. 444

Power of Attorney—Construction—Power to borrow—Power to pledge credit. *See* Agency 232

Practice—Abatement of suit—Formal decree dismissing suit should be drawn up. *See* Civil Procedure Code S. 2. 486

———*Equitable set off—C.P.C. Order VIII* 6, *O.* 20 R. 19—*Subject to limitation—Landlord and tenant—Claim for damages for obstruction in previous years—Not pleadable if barred.*

Apart from special cases like those of mortgagor and mortgagees trustee and cestui-que trust a claim which is barred cannot be the subject of an equitable set off.

Held, accordingly that in a suit for rent by the lessor it was not open to the lessee to plead by way of equitable set off an unliquidated claim for damages for obstruction to quiet enjoyment in previous years which had become barred by limitation.

Vyravan Chetty v. *Daivasikamani Desikar.* (*Wallis, C. J. and Serhagiri Aiyar, J.*) 59

———Original Side—Costs—Fee paid to advocate appearing with vakil. *See* Letters Patent (Madras) Cl. 12 120

———Parties—Trust—Rent due to—Suit for. *See* Temple Committee. 619

———*Variance between pleading and proof—Suit on promissory note—Date of—Variance, in trial—Principle one of circumstances, not of law.*

Practice.—(*contd.*) Page

Where in a suit on a promissory note purporting to be of a particular date the evidence showed that it was executed on some other day and the trial court acting upon that evidence gave a decree to the plaintiff but the High Court reversed the judgment laying stress on the principle that it would introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded on inferences at variance with the case that the plaintiff has pleaded and by joining issue in the case, has undertaken to prove, on appeal to the Privy Council.

Held, reversing the Judgment of the High Court that the principle relied upon was in ultimate analysis one of circumstances and not of law and in applying it, the whole of the circumstances must be taken into account and carefully scrutinised and that the High Court had applied it in an abstract and unsatisfactory way which had sued them in estimating the merits in the controversy before them.

Haji Umar Abdul Rahiman v. Muncherji Cooper (*Viscount Haldane*) *P.C.* 444

Presidency Small Cause Courts Acts S. 69.—*Reference on application under S. 38 without order for retrial or revival of suit —Contract of* service *as co-editor—Power of Managing Director to vary duties and hours of attendance—Suit for salary—No claim, when not forming duties of appointment—Contract Act, S.* 54.

A reference under S. 69 of the Presidency Small Cause Courts Act is competent though no formal order is passed granting a new trial or declaring that the suit has been revived before notice is issued to the respondent on the application under S. 38 *Oakshott* v. *British India Steam Navigation Co.* 1891) C. L. R. 15 M. 179 and *Nusservanjee* v. *Purushotum Dass* (1885) I. L. R. 11 I O 291 dissented from.

Held, that in the absence of any express contract as to the duties of the plaintiff who was appointed a co-editor of a newspaper the Managing Director of the company publishing the newspaper was entitled as a matter of law to vary his duties and hours of attendance at the office form time to time provided such variation was not unreasonable or inappropriate to his appointment as co-editor and that he was not entitled to recover his salary for the period during which he failed to perform the duties so assigned to him. *Ramasamy Aiyar v. The Madras Times, Ltd.* (*Sadasiva Aiyar and Napier, JJ.*) 207

Presumption—Hindu Law—Joint family—Earnings of single member—Self acquisition—Presumption. *See* Hindu Law—Partition. ... 308

Principal and Agent—Agent—Transaction within the scope of authority —Binding nature on principal—Effect. *See* Agency. ... 232

———Contract by agent on his own behalf against instructions of principal—Whether principal can ratify. *See* Indian Contract Act, Ss. 216, 196. 497

Principal and surety—*Negotiable instrument—Surety for—Without concurrence of drawer—Liability of principal debtor—Indian Contract Ss.* **140**, 145,—*Ss.* 69 *and* 70, *applicability of.*

A surety to a negotiable instrument who has become such without the concurrence in the contract of the drawer gets no higher rights against him than an ordinary holder.

He is not entitled to rely on S. 145 of the Indian Contract Act, his rights b ing confined to those given by S. 140, That section gives him a

Principal and surety—(*contd.*) Page.
right of suit on the original obligation but subject to the same limitations as affect the creditor.

Oldfield, J:—Ss. 69 and 70 Indian Contract Act also are inapplicable to the case.

Muthu Raman Chetty v. *Chinna Vallayan Chetty* alias *Chinna Karuppan Chetty* (*Ayling and Napier, JJ.*) 369

Private International Law—*Submission to jurisdiction—Civil Procedure Code, S. 44—Appearance and defence on protest—to get a refund from son to whom debt was paid and to avoid arrest—Submission nevertheless.*

When a decree of a Court in the Cochin state was sought to be executed in the Sub-Court of Palghat, it was objected that the Cochin Court had no jurisdiction to make the decree. Though the defendant had appeared and defended the suit against him, he had protested against the jurisdiction of the Court both in the Court of the 1st Instance and in the Appellate Court. His reasons for appearing and defending were (i) that his creditor's son to whom he had repaid the suit debt refused to refund him the money unless he defended the suit brought by the father, (ii) that if a decree was passed against him he might be arrested when he went to Cochin on business or to see his relations.

Held on a reference to the Full Bench that under the circumstances there was a submission to jurisdiction and the decree could not be impeached by the deft.

Parry and Co. v. *Appasami Pillai* (1880) I. L. R. 2 M 407. overruled.

Rama Aiyar v. *Krishna Patter.* (*Chief Justice, Seshagiri Aiyar and Phillips.*) ... ... 148.

Provincial Insolvency Act, Ss. 4 (a), 18, 19, 36—*Trust created by debtor in favour of some of the creditors of most of the properties for the discharge of debts—S. 36—Transfer in good faith and for valuable consideration—"Void," meaning of—S. 4 (a)—creditor appointed trustee for discharge of debts, a third person, within the meaning of —Official receiver becomes receiver of the insolvent's property only by order under S. 18.*

Where a debtor with the consent of the majority of his creditors executed a trust deed in favour of three of them in respect of most of his properties for paying *pro rata* all his creditors, and 2 years after the debtor put in a petition in insolvency and was adjudicated an insolvent,

Held that the trustees were transferees in good faith and for valuable consideration within the meaning of S. 56 of the Provincial Insolvency Act and the trust deed could not be avoided under that section.

"Void" in S. 36 means only voidable. The word "Purchaser" in the section is used not in the ordinary legal sense of one who has bought a property under a contract of sale but means a person who has given valuable consderation.

Hance v *Harding* (1888) 20 Q. B. D. P. 733 at P. 738 followed.

"Transfer to a third person" in S. 4 (a) includes the conveyance to some of the creditors themselves as trustees for the general body of creditors

The Court should, if it intends the Official Receiver to become vested with the insolvents property, pass an order under S. 18 appointing a receiver. The practice in the mofussil of treating the Official Receiver as

Provincial Insolvency Act—(*contd.*) Page.

vested with the properties of the insolvent as soon as an adjudication order is made without a preliminary order under S. 18 appointing a receiver, is illegal.

Official Receiver of Trichinopoly v. *Somasundaram Chettiar.* (*Sadasiva Aiyar and Moore, JJ*). 415

Privy Council—Leave to appeal—Grant of—Valuation—Principle. *See* C. P. Code of 1908—S. 110 Cl. 1 and 2. 317

Promissory note—Agreement fixing time for payment—Suit on—Limitation—Starting point—*See* Limitation Act, Art. 80 51

Provincial Insolvency Act, Ss. 34, 35—Insolvency of Judgment debtor—Adjudication — Vesting order— Subsequent sale of judgment debtor's property in execution of decree obtained before insolvency—validity. *See* Insolvency of Judgment debtor. 611

Provincial Small Cause Court's Act, S. 25—Interference discretionary. *See* Transfer of Property Act. S. 6 492

Receipt of money by manager of Jaghir—Suit for account by—Entitled to share of income—Art. 62 not applicable. *See* Limitation Act—Arts. 62 and 120. 341

Registration Act, S. 17 Cl. (b). Sub-Section V cl. (2)—*Evidence Act S.* 92 — *Registered lease deed—Unregistered document executed on same date as lease deed and providing for cancellation and delivery of lease deed to lessor and for execution of release deed by lessee—Suit by lessor for cancellation and delivery of lease deed not for execution of release deed by lessee—Admissibility of unregistered document in evidence—Conditions of relief to lessor—Restoration of benefit under Lease deed—Pleadings—Relief not specifically asked for in plaint—Defendant not misled—Effect*

Where the plaintiffs sued (1) for the cancellation and delivery to them of a registered lease deed executed by them in favour of the defendants and (2) for a decree directing the execution by the defendants in their favour of a deed releasing their rights to the property covered by the said lease deed and relied, in support of their claim, upon an unregistered document of even date with the said lease deed given to them by the defendants and providing, in certain events which happened, for cancellation and delivery to the plaintiffs of the lease deed and for the execution of a release, *held* that the unregistered document was not inadmissible in evidence either under S. 17 (*b*) of the Registration Act or under S, 92 of the Evidence Act.

Held, further that plaintiffs were bound to restore to the defendants the benefits that they had obtained under the lease deed.

Per Coutts Trotter, J.—Where, although the exactly appropriate relief is not asked for in the plaint, the defendant knows clearly what it is that is in issue between himself and the plaintiff and goes to trial on that point the appropriate relief may be granted notwithstanding the defect in the plaint.

Sree Raja Dantalooru Pedda Venkata Jagannadha Raju v. *Kurapathi Radhakrishniah* (*Coutts Trotter and Srinivasa Aiyangar, JJ.*) 302

———Ss. 17, 49—*Agreement to lease—By correspondence—Registration essential.*

Where an agreement to lease a certain immoveable property was effected by two letters, one constituting the proposal, and the other, the acceptance and relying upon those letters a suit was instituted for specific performance of the agreement.

Registration Act.—(*contd.*) Page.

Held, that the letters could not be used to prove the agreement as they had not been registered.

S. 15 Cl. (d) of the Registration Act applies not only to leases effected by a single document but also to those effected by correspondence.

Morgan and Son v. *Fernandez* (*Ayling and Napier, JJ.*) ... 519

———**Ss. 17 and 49**—*Partition—List of immovable properties allotted with declaration as to division—Compulsorily registrable—Admissibility in evidence—Limitation Act, Art.* 11—*Civil Procedure Code, O.*21 *R.* 103—*No inquiry, no order—Symbolical delivery—Effect of.*

Where a document signed by all the members of a Hindu family, after mentioning the properties put into the possession of each of them, wound up saying "in the presence of the witnesses hereunder we divide."

Held, (*By the Full Bench*) that the document was inadmissible for want of registration and could not be used even for the purpose of proving division of status.

Where a purchaser in execution, of the interest of one of the members of a Hindu family, whom he alleged to be divided in interest, was resisted by the other members of the family claiming to be in possession and the Court without deciding whether the family was or was not divided directed that the property should be delivered symbolically,

Held, Per Spencer, J.—That the purchaser was not bound to set aside the order in one year.

Per Sadasiva Aiyar, J.—That the members of the family also were not bound to set it aside within one year.

Per Sadasiva Aiyar, J.—Symbolical delivery has not the effect of dispossessing any person other than the judgment-debtor.

Ayyakutti Mankondan v. *Periasawmi Koundan.* (*Chief Justice, Seshagiri Aiyar and Kumarasami Sastri, JJ.*) 404

———**Ss. 17 and 49**—*Partition—Hindu Law—Unregistered deed—Construction—Immoveables and moveables—Bad as to one, bad as to both —No intention to effect severance without deed taking effect—No division of status by declaration contained in.*

In a suit to question an alleged partition between the minor plaintiff and his paternal uncle, the document which was said to effect it was, as follows: "As we have in the presence of the undermentioned panchayatdars divided into equal moieties, the cash, moveables and immoveables, Court decrees, etc., of which we are now possessed, our connection shall hereafter be only by relationship but we shall have no monetary connection in respect of these properties."

Held, that the document had the effect of causing immovable properties heretofore held by the co-parceners as joint tenants thenceforward to be held by them as tenants-in-common and as such, without registration, could not affect immoveable property.

Held, also, that in the absence of any clear intention expressed in the document that movables should be partitioned apart from the immovables the document did not affect even the movables.

Held, further per *Sadasiva Aiyar, J.* that the unequivocal declaration contained in the document could not be held to effect a severance, as there was no intention to divide without the deed itself simultaneously taking effect.

Pothi Naickan v, *Naganna Naicker*. (*Wallis, C.J., Sadasiva Aiyar and Seshagiri Aiyar, JJ.*) *F. B.* 62

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Religious Endowment— *Mutts—Junior Pàndarasannadhi—Naturè of the officè—Removal from office—Grounds for—Notice of charges necessary—Office at pleasure—Incidents of — Compromise decree recognising plaintiff as holder of a religious office—Validity of—Civil Procedure Code, S. 367 (O. C.)—Suit by a legal representative to establish his position as such—What the plaintiff in such a suit is bound to show—Mutts, whether voluntary associations or brotherhoods —Immorality of a Matàdhipati or junior—Whether entails forfeiture of the position.*

Where the Matadhipati of the Dharmapuram Adhinam having ordained and nominated a junior Pandarasannadhi purported to remove the junior without giving him any notice or opportunity to answer the charges against him,

Held, that the dismissal was bad.

The nomination and ordination of a junior Pandarasannadhi is the customary manner of providing for the line of succession in Mutts of the kind; and the Pandarasannadhi (Matadhipati) can dismiss the junior only for good cause and not arbitrarily.

The position of a junior Pandarasannadhi is analogous to that of a co-adjutor, with the right of succession, a right of which he cannot be deprived except for good cause.

Where an office is held at pleasure, the holder of the office can be removed without any notice. In all othere cases, there should be notice to the incumbent of the office to answer the charges before dismissing him.

Where a Matadhipati purported to remove a junior and the latterfiled a suit questioning the dismissal, a compromise decree in such suit recognising the plaintiff as junior is binding on the parties to the suit and their representatives unless such decree is set aside by a separate suit on proper grounds. Till the decree is set aside, it is binding on the parties just as much as if it had been passed after contest.

Any illegality in the compromise decree in so far as it restrains the Matadhipati from removing the junior in case of any future misconduct of the latter, is no ground for setting aside the decree altogether in a suit by the Matadhipati for that purpose.

Per Seshagiri Aiyar, J.—Where a Matadhipati brings a suit for a declaration that the defendant, whom he appointed as a junior and in whose favour he relinquished the Mutt and all the properties, is not the lawful Pandarasannadhi, and dies pending the suit and a person appointed by him as successor before his death applies to continue the suit as legal representative and he (the representative) is directed to being a separate suit to establish his character as legal representative under S. 367 of the old Code, he should in such subsequent suit show that he has stepped into the shoes of the deceased with all the attributes he claimed and it is open to the defendant in the latter suit to show that the deceased had no rights to transmit.

The junior Pandarasannadhi does not hold his position at the will of the senior.

The position of the junior Pandarasannadhi discussed.

Mutts are not voluntary associations or brotherhoods; and the heads of the institutions have no plenary powers to dismiss any member including the junior Pandarasannadhi.

Religious Endownment.—(*contd.*) Page.

The head of a Mutt or a junior does not forfeit his position by misconduct such as leading an immoral life, but is liable to be removed for such misconduct. There can be no condonation of such an offence as in the case of breaches of trust.

Where in a suit by the junior Pandarasannadhi against the senior questioning the dismissal of the junior from his position a compromise is come to, the object of which is to recognise the usage of the institution and to accept the validity of the original appointment and a decree is passed on the compromise, such a decree is not illegal.

The nature and validity of compromise decrees discussed. ... 274

Thiruvambala Desikar Gnana Sambanda Pandaram v. Chinna Pandaram alias Manikkavasaka Desikar. (*Chief Justice and Seshagiri Aiyar, J.*)

——*Roman Catholics—Church—Right to prevent a class to enter a portion of Church—Customary right unknown to the authority of Bishop—Canon Law, sole authority—Cannot be altered by agreement by members, or custom—Caste cannot be recognised as corporation among Christians—Agreement between Castes binding only on actual parties.*

Where a section of Roman Catholics in a particular locality claiming to be high caste Christians sought to prevent another section from entering upon or occupying a portion of the Church premises where they claimed to have the exclusive right of being seated and of partaking in the ceremonies conducted there, notwithstanding the order of the Bishop that there should be no such distinctions in the Church.

Held, that under rules of the Canon Law which must govern the matter, the Bishop's authority (subject to control from higher Church authorities) was supreme and the plaintiffs could not question it.

Per Napier, J.:—The right claimed is inadmissible as a customary right, a right of that character being unknown to law.

Per Curiam :—Church buildings as soon as they are consecrated become vested in the Pope for the worship of God according to the tenets of the Roman Catholic Church and no Bishop can bind the Church or his own successor by any agreement of his relating to Church property.

Per Napier, J.: —The Canon Law is the sole guiding authority as to the rules binding on the congregation as members of the Roman Catholic Church and the congregation of a particular locality cannot by an agreement between themselves seek to derogate from the authority of the rulers of the Church as conferred by that law.

Per Sadasiva Aiyar, J.:—Castes as distinct corporations in the way in which they are understood among Hindus, cannot be recognised among Christians and as such, an agreement purporting to be between two castes can be binding only on the actual parties to the agreement.

Michael Pillai v. Bishop of Trichinopoly (*Sadasiva Aiyar and Napier, JJ.*) 423

——Temple Committee—Death of member—Effect on powers of Committee. *See* Religious Endowments Act, Ss. 3, 4. ... 29

——Visitatorial jurisdiction—Nature of. *See* Religious Endowments Act, Ss. 3, 4. 29

Religious Endownments Act (Act XX of 1863) Ss. 3, 4—*Power of Court to frame scheme—Civil Procedure Code, S. 92—Powers of Committee*

Religious Endownments Act.—(*contd.*) Page

—*Death of member—Not suspended—Board of Revenue, powers of—Appointment of hereditary trustee — One trustee hereditary, rest appointed by committee subject to committee —Right to call for accounts.*

The Court's jurisdiction to frame a scheme under S. 92, Civil Procedure Code, is not excluded by the fact that the temple for which the scheme is to be framed is one subject to a Temple Committee but in framing the scheme the Court should not unduly interfere with the powers entrusted by the statute to the Committee.

The powers of the Committee are not suspended by the occurrence of a vacancy among its members.

Santhalva v *Manjanna Shetty* (1911) I.L.R. 34 M. 1=20 M.L.J. 814 dissented from.

Quaere. whether it was competent for the Board of Revenue under Reg. VII of 1817 to divest itself of all responsibility by appointing a hereditary trustee.

Per Chief Justice :—A temple of which one of the trustees is a hereditary trustee and the other trustees are appointed by the Committee comes under S. 3 of Act XX of 1863.

Some of the decisions have unduly fettered the powers of the Committee which, it was intended by the Legislature, should possess all the powers conferred on the Board of Revenue by Reg. VII of 1817.

Per Seshagiri Aiyar, J. :—There is no reason to doubt the correctness of the course of decisions of this Court as to the powers of the Committee though it is doubtful if the decisions that lay down that no account can be called for, from hereditary trustees, are right.

Nature and scope of visitatorial jurisdiction considered.

Sitharama Chetty v. *Sir S. Subramania Iyer.* (*Wallis, C. J. and Seshagiri Aiyar, J.*) 29

Religious office—*Females not disqualified from inheriting to hereditary religious office—Hindu Law and custom—Performance of duties by proxy.*

A female is not under Hindu Law or custom disqualified from succeeding to a hereditary religious office and getting such duties performed by proxy.

Ramasundaram Pillai v, *Savundarathammal* (1914) 16 M. L. T 423

Thangirala Chiranjivi v. *Raja Manikya Rao* (1914) 27 M. L. J. 179 followed.

Sundarambal Ammal v. *Yogavana Gurukkal* (1914) 26 M. L. J, 315 dissented from.

Raja Rajeswari Ammal v. Subramania Archakar. (*Kumarasami Sastri and Phillips, JJ*). 222

Res judicata—Judgment pending appeal or before appeal time expires—Only provisional judgment—No bar of res judicata. *See* Civil Procedure Code, S. 11 379

——**Mortgage**—Decree for sale—Subsequent suit for redemption—Maintainability. *See* C.P. Code, S. 11. 18

——*Point of Procedure—No* res judicata *when procedure altered by statute—Transfer of Property Act, S. 99—Application rejected by reason of—Renewal of, after new Civil Procedure Code—Limitation Act, Art. 182, cls. (5) (6)—Issue of notice on application not in accordance with law—Limitation saved—At the alleged starting point, decree not to be barred.*

Res-Judicata.— Page.

Art. 182 of the Limitation Act should receive a fair and liberal and not too technical a construction so as to enable the decree-holder to obtain the fruits of his decree.

The issue of a notice under O. 21, R. 22, Civil Procedure Code is sufficient to save the bar of limitation though it is issued on an application "not in accordance with law" within the meaning of cl. (5) of Art. 182.

Admission on a question of procedure cannot be treated as *res judicata*, when the procedure itself is altered by the statute.

On an application by the decree-holder in 1908 for the sale of the attached properties, notice was issued but the application was ultimately dismissed as the property was subject to a mortgage in favour of the decree-holder and the sale of the property in those circumstances was prohibited by S. 99 of the Transfer of Property Act. In 1911, after the passing of the new Civil Procedure Code, the application was renewed by the decree-holder. It was then contended that the application was barred because it was more than 3 years from the last "application in accordance with law," the application of 1908 being not in accordance with law inasmuch as it prayed for a relief which could not in law be granted. It was also contended that the application was barred by the principle of *res judicata*.

Held, that the application was in time being within 3 years of the issue of the notice on the application of 1908 and was not also barred by *res judicata*.

A fresh starting point can be availed of under Art. 182 only if at the date of the alleged starting point, the decree is not barred.

Varadaraja Mudali v. Murugesam Pillai. (*Sadasiva Aiyar and. Napier, JJ*). 460

Restitution—One decree superseded by decree in another suit—Money paid under the superseded decree—Can be recovered in restitution. *See* C. P. Code, S 144... 366

Ryoti land—Whether can be converted into Ryotwari—Agreement between the Zamindar and Government. *See* Permanent Settlement ... 545

Service Tenure—Resumption—Tests—Grant burdened with service—Grant in lieu of—Distinction. *See* Grant. 132

Specific Performance—*Contract for sale of Land*—Prima facie *time not of the essence of the Contract—Indian Contract Act, S. 55—Equity—Rule of, explained—Indian and English Law, same.*

In the case of contracts for the sale of land, time is presumed in equity not to be of the essence of the contract and specific performance will be enforced notwithstanding the failure to keep the dates assigned by the contract, if justice can be done and there is nothing in the express stipulations, the nature of the property or the surrounding circumstances which would make it inequitable to interfere with and modify the legal rights of parties.

The Indian Legislature only embodies this doctrine of Equity in S. 55 of the Indian Contract Act.

Equity will not assist where there has been undue delay on the part of one party to the contract and the other has given reasonable notice that he must complete within a definite time.

Equity looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they

Specific Performance.—(*contd.*) Page

named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. *Prima facie*, it treats the importance of such time limits as being subordinate to the main purpose of the parties and where reliance is placed upon an express stipulation as excluding the ordinary presumption, the language of the stipulation must show that the the intention was to make the rights of the parties depend on the time limits prescribed in a fashion which is unmistakable.

An intention that time should be of the essence of the contract may be inferred from what has passed between the parties prior to the signing of the contract but not from what takes place after the contract has been entered into unless it amounts to an agreement to modify the terms of the earlier contract.

On 8th July 1911, the respondent agreed to sell his lease-hold interest to the appellant for Rs. 85,000 and the appellant paid Rs. 4,000 as a deposit. The agreement provided that the conveyance was to be prepared and received within 2 months, that on signing the document of sale Rs 80,500 was to be paid, and after its registration the remaining 500; but should the purchaser not pay the amount within the fixed period, he was to have no right to the deposit and the vendor was, after that date, to be at liberty to re-sell. The appellants solicitors proceeded to investigate the title and made certain requisitions in respect of it on the 3rd October. The respondent did not comply with the requisition but on the 6th October, asserted his right to put an end to the contract. In a suit for specific performance by the appellant (vendee).

Held, that there was nothing in the contract or in the circumstances to entitle the vendor to insist upon time being treated as of the essence of the contract and that the plaintiff was entitled to specific performance.

Tilley v. *Thomas* (1867) L. R 3 Ch. App 61. approved. *Stickney* v. *Keeble* (1915) L. R. A. C. 386 referred to.

Khodaram Irani v. *Burjorji Dhunjibhai Contractor*. [*Viscount Haldane*] P. C. 186

Specific Relief Act S. 9—Suit under—Decree for mesne profits—Validity. *See* C. P. Code, S. 2 (12) 326

———**—S. 37**—Contract to sell--Subsequent registered conveyance to third party—Ejectment suit by first contractee against subsequent purchaser—Maintainability--Subsequent purchase with notice of prior contract—Effect. *See* Trusts Act, S. 91 559

Statute—Interpretation--New Statute--Remedies given by, when available in respect of transactions before the statute. *See* Transfer of Property Act, Ss. 2 (c) 98 and 67, ... 338

Suit for account of money by manager of Jaghir—Suit by person entitled to share of income—Art. 120 applicable. *See* Limitation Act, Arts, 62 and 120. 341

Temple Committee—*Dismissal of Temple Trustee—Validity—Failure to give opportunity for defence—Effect—Temple Rent due to—Suit by two out of five trustees, others being made defendants—Suit instituted without consulting defendants—Trustee—Effect--Payment to one of several Trustees—Payment to majority—Validity—Condition.*

The dismissal by a Temple Commitee of the trustee of a temple is invalid if the dismissal is made without calling upon the trustee to answer the charges in respect of which he is dismissed.

Temple Trustee— Page.

Where the managing member of the Committee sent proposals to the other members to dismiss the trustee and before he received answers from all the members took upon himself to inform the trustee that he had been dismissed:

Held, that he had no right to proceed in that way

In a suit to recover rent brought by two out of five trustees of a temple, the other three being added as defendants, *held*.

(1) that the suit was competent notwithstanding that it was not valid inasmuch as there were disputes between them and the plaintiff at the time to the knowledge of the tenant and the plaintiff had asked him not to pay to the defendants but pay it to himself.

Circumstances under which payment to one out of many trustees might be valid considered,

Quære: Whether at a properly convened meeting a majority of the rustees might decide that payment should be made to them in exclusion of the other trustees.

Ponnamballa Pillai v. Muthu Chetiar (Sir. John Wallis, Chief Justice and Mr. Justice Phillips, J). ... 619

Tender—Mortgage—Deposit of mortgage amount—Validity—Conditions. *See* Mortgage. 607

Time—Calculation—Fraction of day when reckoned as whole. *See* Mogtgage. 604

Tirumaligai—Private property. *See* Hindu Law, Guardian ... 507

Tort—*Malicious procuring of order for attachment before judgment —Attachment not effected, on furnishing Security—No right of action.*

It a suit for damages for maliciously and without reasonable cause procuring an order for attachment before judgment of the plaintiff's movables, no attachment in fact having taken place as he furnished security.

Held, that the plaintiff had no cause of action.

Ramasami Aiyar v. Govinda Pillai (Sadasiva Aiyer and Napier, JJ.) 180

Transfer of Property Act, Ss. 2 (c), 58 and 67—*Mortgage by conditional sale—Mortgage before the Transfer of Property Act—Absence of words of conveyance, effect of—Law before the Act, applicability of—Remedies under the Transfer of Property Act, if available—Statute—Interpretation.—Limitation Act, Art.* 132, 135.

Where a mortgage document of the year 1879 did not in terms purport to sell the mortgaged property but only contained a covenant by the mortgagor to relinquish all rights in the property as if it had been sold, in case there was default in payment of the mortgage money within the stipulated period, *Held* that the document should be construed with reference to the law as it stood before the Transfer of Property Act and so construed it wss a mortgage by conditional sale.

Pattabhiramier v. *Venkatarow Naicken* (1870) 13 M. I. A. 560. *Thambusami's case* (1875) L. R. 2. I. A. 241 referred to.

Held, further, that the remedies given by S. 67 of the Transfer of Property Act could be availed of, by the parties to the document and that there was nothing in S. 2 (c) of the Act to disentitle them from so doing.

Transfer of Property Act.—(*contd.*) Page

Suit for foreclosure in respect of such document is governed by Art. 132 and not by Art. 135 of the Limitation Act.

The right to a relief arising from a certain jural relation existing between parties is a matter of adjective law, and consequently the parties are entitled, when a new remedy has been provided by a new Act at the time when the relation subsists, to take advantage of the remedy in a Court of law.

Pergash Koer v. *Mahabir Pershed Narain Singh* (1885) I. L. R. 11 C. 582 *Bholio Sundari Debi* v. *Rakhal Chunder Bose* (1886) I. L. R. 12 C. 583. *Kaveri* v. *Anathayya* (1886) I.L.R. 10 M. 129. *Mata Din Kasodhan* v. *Karim Husain* (1869) L. R. 13 A 432 relied on. *Srinath Das* v. *Kotter Mohan Singh* (1889) L R 16 A 85 distinguished.

Bikkin Ramayya v. *Adabala Seshayya*. (*Coutts Trotter and Seshagiri Aiyar, JJ*) 338

———**S. 6**—*Claim to damages for use and occupation—Not assignable—Provincial Small Cause Courts Act S. 25—Interference discretionary—No interference when no merits.*

A claim to damages for use and occupation from a tenant continuing on the land after the expiration of his lease, without the landlord's consent is a mere right to sue for damages and is not transferable.

Interference under S. 25 Provincial Small Cause Courts Act is discretionary and the High Court is not bound to interfere when there is no case on the merits.

Govindaswami Pillai v. *Ramaswami Aiyar*. (*Sadasiva Aiyar and Moore, JJ.*) 492

———**S. 51**—Improvements — Compensation, Right to, of person in possession under unregistered deed of exchange. *See* Estoppel. 1

———**S. 53**—Fraudulent transfer—Mere preference of a creditor—Effect. *See* Fraudulent Conveyance. 116

———**S. 65 (c)**—*Acquisition of equity of redemption by prescription against mortgagor—Non-payment of public charges—Revenue sale—Purchase by acquirer—No fraud—Extinguishment of mortgage.*

The duty cast on the mortgagor by S 65 (c) Transfer of Property Act to pay the public charges is a personal one affecting the person in possession under the contract and is not a covenant which touches or concerns property and as such a person who has acquired the equity of redemption by prescription against the mortgagor is not under a duty to pay the same. Hence if such person allows property to be sold for arrears of revenue though he purchases it himself, the mortgage right will be extinguished.

Punugu Subian v. *Nukalapati Rami Reddi*. (*Seshagiri Aiyar and Kumarasami Sastri, JJ.*) 331

———**Ss. 83, 84**—Mortgage amount—Tender—Validity—Essentials—Bona fide mistake in amount—Effect—Interest for a day on which the deposit is made—Liability for. *See* Mortgage ... 607

———**S. 101**—Mortgagee becoming entitled to the equity of redemption—Merger. *See* Civil Procedure Code, S. 52. 391

———**S. 108**—Principle of—Applicability—To crown grants. *See* Lease. ... 575

Transfer of Property Act.—(*contd.*) Page

———**S. 118**—Exchange—Unregistered instrument — Part-performance —Actings of parties.—Effect. *See* Estoppel ... ...

———**S. 132**—Applicability—Mortgage—Assignment—Suit by assignee for sale—Right to set off decree debt, due by assignor. *See* C.P. Code, O. 8, R. 6. 615

Trust—Rent due to—Parties—Suit by two out of five trustees, the others being added defendants—Payment to one trustee—Payment to majority—Validity—Conditions *See* Temple Committee. ... 613

Trusts Act—**S. 91**—*Transfer of Property Act, Ss.* 40, 54—*Contract to sell immovable property—Conveyance of the property to another having notice of the contract—Subsequent conveyance by the vendor to the first Contractee—Delivery of possession to first Contractee—Suit in ejectment by the first vendee—First Contractee can defend his possession—Specific Relief Act, S. 27.*

Defendants 1 to 3 contracted to sell certain immovable property to defendants 4 and 5 but sold the property by a registered sale deed to the plaintiff who had notice of the prior contract. Subsequently defendants 1 to 3 executed a registered sale deed of the same property to defendants 4 and 5 in pursuance of the prior contract and put them in possession.

In a suit in ejectment by the plaintiff, *Held*, that having regard to the duty imposed upon the plaintiff by S. 91 of the Trusts Act, plaintiff was not entitled to recover possession from defendants 4 and 5.

Lakshmi Doss v. *Roop Laul* (1906) I L R 30 M 169 followed.

Kurri Veera Reddi v. *Kurri Bapi Reddi* (1904) I. L. R. 29 M. 336 distinguished.

Thiruvenkatachariar v. *Seshadri Iyengar.* [*Chief Jutice and Srinivasa Aiyangar, J.*] 559

Vendor and purchaser—Contract to sell to A—Subsequent registered conveyance to B—Ejectment suit by A against B—Maintainability—B's purchase with notice of contract in favour of A—Effect. *See* Trusts Act, S. 91 559

Will—*Execution—Social position of witnesses—Suspicion—Evidence—Note of evidence of proposed witness—Privileged from production—Non-production irrelevant.*

Where the will was not one which, a Hindu gentleman, situated as the testator was, might not reasonably and naturally have made and there was nothing in the case to suggest that the will had been forged or that the witnesses who gave evidence as to the preparation and as to the due execution of the will had committed perjury, their Lordships declined to accept the contention that the will should not be accepted as a genuine will because the witnesses to its execution, were not of superior position. In such a case something more than mere suspicion was necessary to make convincing an argument based on the social position of the witnesses.

Held, also, the notes of the evidence which one of the witnesses could give, obtained from the witness by the person acting on behalf of the appellant and for the purposes of the appellant's brief in the litigation, as to the grant of the probate of the will, was privileged from production and the High Court erred in allowing their minds to be influenced in considering the evidence, by the fact that it was not produced.

Dulhin Genda Kunwar v. *Harnandan Singh* 624

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Will—*In perfect form and proved—Court not to re-create the will that the testator ought to have made.*

When a will has once been made and is apparently in perfect form and the evidence of the atesting witness is to be trusted, few things can be more dangerous than to attempt to re-create the kind of will that the man ought in the opinion of the court to have made. Once the man's mind is free and clear and is capable of disposing of his property, the way in which it is to be disposed of rests with him and it is not for any court to try and discover whether a will could not have been for more consonant either with reason or with justice.

Arunachellam Chetty v. Ramaswami Chetti (Lord Chancellor) P.C. ... 555

Words—"Continuous breach"—Meaning—Illustration. *See* Lease. ... 575

———Deposit—Meaning. *See* Limitation Act, Art 59, 60 ... 245